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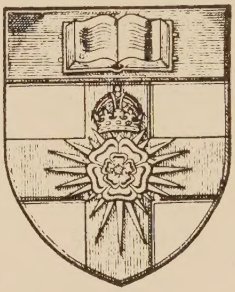

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CASES

DETERMINED BY THE

CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

LUNACY.

In re MARKHAM.
MARKHAM *v.* MARKHAM.

[1876 M. 273.]

C. A.
1880
Nov. 2.

Practice—Appeal—Leave to Person not a Party to appeal.

Leave to a person interested in, but not a party to an action, to appeal from an order, may be obtained by *ex parte* application to the Court of Appeal.

17 Ch D 20
22 Ch D 93
23 Ch D 25

THIS was an application for leave to appeal from an order on further consideration.

Isaac Markham, by his will, made in 1848, directed his residuary personal estate and the proceeds of the sale of his real estate after the death of his wife to be equally divided amongst his brothers and sisters and the brothers and sisters of his wife: that was to say, as many of each party as might be then living; but if the death of any of his brothers or sisters, or of the brothers or sisters of his wife, should take place before the death of his

C. A. 1880

In re MARKHAM. MARKHAM *v.* MARKHAM.

wife, then their children were to take their father's or mother's share.

The testator died in 1869, and his widow on the 20th of May, 1876. Upon her death a suit was instituted for the administration of his estate. It appeared that *Mary Robinson*, one of the sisters of the widow, died in 1872, leaving one child only, *John Robinson*, who died a few days before the widow.

By order, dated the 18th of August, 1880, made on further consideration, a declaration was made that the estate was divisible among such of the testator's brothers and sisters, and the brothers and sisters of his wife, as survived the wife, and such of the children as survived the wife of such his brothers and sisters and the brothers and sisters of his wife as were living at the date of his will and subsequently died in his lifetime or in the lifetime of his wife.

John Robinson had left no legal personal representative. His interest had been assigned to *Joseph Buckton*, but the assignee had not been served with notice of the decree, and at the hearing on further consideration *John Robinson's* interest was not represented.

Buckton now desired to appeal from the order on further consideration, which excluded him from participating in the estate.

Dunning, for the application:—

According to the practice before the Judicature Acts a party interested, though not a party to the cause, could obtain leave to appeal. The Acts and Rules do not contain anything bearing on the point, and it is submitted that the old practice remains: *Seton* on Decrees (1). According to that practice, the application was made by petition or motion *ex parte*: *Parmiter* v. *Parmiter* (2).

THE COURT (Lord *Selborne*, L.C., and *Brett* and *Cotton*, L.JJ.) gave leave to appeal upon production to the Registrar of an affidavit verifying the title of the applicant to the interest of *John Robinson*.

Solicitors: *Duncan, Warren, & Gardner.*

(1) 4th Ed. p. 1605.

(2) 2 D. F. & J. 526.

In re CLAY AND TETLEY.

C. A.
1880
V.-C. H.
June 26.
C. A.
Nov. 3.

Will—Charge of Debts—Renunciation by Executor—Power of Administrator with Will annexed to sell—22 & 23 Vict. c. 35, s. 16—Practice—Time for Appealing—Refusal of Application—Rules of Court, 1875, *Order* LVII., *r.* 8 (*April*, 1880); *Order* LVIII., *r.* 15.

A testator directed that his debts should be paid by his executors thereinafter named, and in case his personal estate should be insufficient, he charged his real estate with the deficiency; and he appointed two persons his executors. Both the executors renounced probate, and an administrator with the will annexed was appointed:—

Held, on summons taken out under the *Vendor and Purchaser Act*, 1874, that the administrator with the will annexed had no power to sell the real estate, either under the terms of the will or by virtue of the 22 & 23 Vict. c. 35, s. 16.

When an order refusing an application contains a declaration or expression of opinion of the Judge as to the rights of the parties, it is not a mere refusal of the application so as to oblige an appeal to be brought within twenty-one days from the date of the refusal under Order LVIII., rule 15.

IN this case a summons was taken out in the Chambers of Vice-Chancellor *Hall* under the *Vendor and Purchaser Act*, 1874, and was adjourned into Court.

It appeared from the statement of the point in dispute, that *Thomas Clay*, by his will, dated the 20th of March, 1870, directed that all his just debts, funeral and testamentary expenses, should be fully paid and satisfied by his executors thereinafter named; and in case his personal estate should be insufficient for that purpose, then he charged his real estate with the payment of the deficiency. He then gave, devised, and bequeathed all his real and personal estate to his wife *Eliza Clay* for life, with remainder to his daughter for life, with remainder to his daughter's children equally, some of whom were still surviving. The testator then directed that his executors should, upon the decease of his said wife, sell and dispose of all his real and personal estate for the purpose of dividing the same as therein mentioned, and he appointed *Thomas Topham* and *Charles Severn* his executors.

The testator died in April, 1879.

C. A. 1880 — *In re* CLAY AND TETLEY.

Both of the executors renounced probate, and letters of administration with the will annexed were granted to *Eliza Clay*.

Part of the real estate of the testator consisted of a freehold house in *Derby*. *Eliza Clay* put up the house for sale by auction, and it was purchased by *T. Tetley*. He objected that *Eliza Clay*, as administratrix with the will annexed, could not make a title to the property; and the summons was taken out by the vendor for the purpose of deciding the question.

The summons was heard before Vice-Chancellor *Hall* on the 26th of June, 1880.

Simmonds, for the vendor:—

The grantee of letters of administration with the will annexed can exercise the power of sale given by this will. The power is exerciseable by the legal personal representative, though he be not named in the will, for if it is to be exercised, it must be exercised by some person: *Sabin* v. *Heape* (1); *Eidsforth* v. *Armstead* (2); *Robinson* v. *Lowater* (3). If an administrator cannot sell the property, no person can do so. Certainly the beneficiaries alone cannot sell. The administrator has had the duty of paying the debts cast upon him, and how can it be performed unless he has all the powers of an executor?

This was the law independently of the statute 22 & 23 Vict. c. 35. But it is made still clearer by that statute. For by the 16th section it is enacted that where a testator has created such a charge as in this will, the executor or executors for the time being named in the will (if any) shall have power to raise the money by sale; and it goes on to provide that "such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested." If the power is to be confined to the original executors, the latter clause is unmeaning.

H. Cadman Jones, for the purchaser:—

The question apart from the act is one of intention—has the testator authorized the administrator to sell? The language of

(1) 27 Beav. 553. (2) 2 K. & J. 333.
(3) 5 D. M. & G. 272.

Lord Justice *Turner* in *Robinson* v. *Lowater* (1) does not import that under a charge of debts the legal personal representative can sell. His Lordship is only giving a reason for holding that the executor whom the testator directed to pay his debts could sell. His judgment proceeds on the ground that the charge amounted to a direction that the estate should be sold. This lets in the old cases as to a direction that estates should be sold, not saying by whom. In those cases it was held that if the proceeds are distributable by the executor he can sell, and that the executors of an executor have the like power: *Sugden* on Powers (2). In the first case on the subject, the decision is rested on the ground that confidence was placed in the executor, and there is no trace anywhere of an administrator being held entitled to sell. According to *Robinson* v. *Lowater* (3), the charge is tantamount to a direction that the executor shall sell; and if that had been said in terms the administrator with the will annexed could not have sold: *Sugden* on Powers (4). The power cannot be exercised by a person who is neither nominated by the testator nor by any person nominated by him. The Act was intended to embody the law on the subject, as appears from sect. 18: and it would not be right now to extend the power to cases not contemplated by the Act. The Act gives no such power. The vendor wishes to construe sect. 16 as meaning that the legal personal representative for the time being shall sell, but if the Act had intended that it would have said so. It gives power to the executors named in the will, and provides that it shall "devolve" upon the persons in whom the executorship is for the time being vested. The executorship is not vested in an administrator with the will annexed, who only derives his authority from the Court, not from the testator. And the word "devolve" can only apply where the power has vested in an executor.

Simmonds, in reply:—

The direction in the will to the executors must include the legal personal representative where the executors have renounced

(1) 5 D. M. & G. 277. 15 Jur 363
(2) 8th Ed. pp. 115, 116, 118, sects. 42, 43, 44, 45, 48, 50.
(3) 5 D. M. & G. 272. 15 Jur 363.
(4) 8th Ed., Appendix, p. 895.

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the performance of the duty imposed upon them. Taking the will and the cases and the statute as a whole, the charge ought not to be held as failing for the want of a trustee or an executor, and therefore the administratrix ought to be supported in the exercise of the power of sale.

HALL, V.C.:—

The question is raised by a summons under the *Vendor and Purchaser Act*, 1874, and has reference to the construction of the 22 & 23 Vict. c. 35, ss. 14, 15, 16, and 18. I cannot hold, upon a fair construction of the statute of 1859, that an administrator can under its provisions exercise a power of sale. If I did so, I should, I think, be considered as amending an Act of Parliament. I should, however, very much like to be able to grant this application, but I cannot substitute the word "representative" for "executors," which the testator has twice mentioned in his will, and I must look at the will and ascertain who were directed to sell the property. I find that the testator said that his debts were to be paid "by my executors hereinafter named," and that he directed "that my executors shall . . . sell and dispose" of the estate; and that he appointed two executors. The executors, therefore, were the persons to pay the debts and to sell the property for the purpose. I cannot upon this summons make the purchaser accept the title, as the administratrix cannot sell under the statute of 1859. The summons must, therefore, be dismissed with costs.

The Vice-Chancellor accordingly made an order to the effect that the Court being of opinion that a title had not been shewn to the said hereditaments, did not think fit to make any order on the application, but did order that the applicant should pay the costs of the application.

The order was made on the 26th of June, but was not passed and entered till the 16th of July. On the 17th of July, which was Saturday, a notice of appeal was served by the vendor on the purchaser's solicitors at ten minutes past 2 P.M.

On the appeal coming on for hearing on the 3rd of November,

H. Cadman Jones, for the Respondent, objected that the notice

of appeal was served too late. The twenty-one days limited by Order LVIII., r. 15, expired on the 17th of July, and by Order LVII., r. 8 (April, 1880), for the service being after 2 o'clock on Saturday afternoon, must be taken as effected on the following Monday.

THE COURT having intimated that the objection could not be sustained, the argument proceeded.

Simmonds, for the Appellant, relied on the same arguments as in the Court below.

H. Cadman Jones, for the purchaser, was not called on.

JESSEL, M.R. :—

I am of opinion that the decision of the Vice-Chancellor was well founded in law, and must be affirmed. The only implied power to sell the real estate of the testator is in the executors. That is implied because the executors are appointed by the testator to pay his debts. They are his nominees for that express purpose. There is no authority for saying that the Courts have ever implied such a power in an administrator who is not appointed by the testator but is the officer of the Probate Court. The testator could not have anticipated that the persons he had appointed his executors would renounce probate. That being so, it cannot be right that the Court should now for the first time imply a power in the administrator to sell the testator's real estate.

The only other point was the construction of the 16th section of the statute. But that section was carefully framed so as to confine the power thereby given to the executors and persons on whom the executorship devolves. It is impossible to suppose that the Legislature had forgotten that there were such persons as administrators as well as executors. The words are not fairly open to any construction but their natural meaning. Therefore I am of opinion that the appeal must be dismissed.

With respect to the preliminary objection, I desire to say that whenever an order dismissing an application contains a declaration as such, or as an expression of opinion of the Judge, so as to bind the rights of the parties, it is not a simple refusal of the

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application, within the meaning of the 15th rule of Order LVIII., so as to compel the appeal to be brought within twenty-one days from the date of the refusal.

JAMES and COTTON, L.JJ., concurred.

Solicitors: *Dubois & Reid*, agents for *J. Close, Derby; Gard, Corbin, & Hall*, agents for *J. M. Owen, Derby.*

C. A. 1880 V.-C. M. *Aug.* 6. C. A. *Nov.* 4.

REPUBLIC OF COSTA RICA *v.* STROUSBERG.

[1879 C. 78.]

Practice—Judgment Debtor—Examination—Rules of Court, 1875, *Order* XLV., r. 1.

The examination of a judgment debtor under Rules of Court, 1875, Order XLV., r. 1, touching the debts due to him is intended to be a cross-examination of the strictest character, and the debtor when under such an examination is bound to answer all questions relevant to the subject-matter and cannot insist on the examination being confined to the simple question "whether any and what debts are due to him."

THIS was an appeal from the decision of Vice-Chancellor *Malins.*

In this action the Plaintiffs, who were judgment creditors of the Defendant, obtained an order under Order XLV., r. 1, of the Rules of Court, 1875, that a special examiner should be appointed for the purpose of taking the examination of the Defendant, as to whether any and what debts were owing to him, and that the Defendant should attend before the special examiner for the purpose of being so examined, and should then produce all accounts, books of accounts, bankers' passbooks, letters, agents' memoranda, and other documents in his possession relating to such debts.

The Defendant accordingly attended before the special examiner, but refused to answer, amongst others, the following questions:—

Whether he had any banking account with any other banker than Messrs. *Drummond;*

Whether he was carrying on any business at the present time;

Whether he had any contracts pending;

Whether any money was due to him for rent—

or, in fact, any question other than what debts were due to him.

The Plaintiffs then moved before Vice-Chancellor *Malins*, on the 6th of August, 1880, that the Defendant might be ordered to attend at his own expense before the special examiner to be further examined as to whether any and what debts were owing to him, and that he might be ordered there and then to answer the questions which he had refused to answer upon his former examination.

Glasse, Q.C., *Kekewich*, Q.C., and *H. A. Giffard*, for the motion.

Higgins, Q.C., and *Medd*, for the Defendant.

MALINS, V.C.:—

The Republic of *Costa Rica* obtained judgment against Mr. *Strousberg*. Rule 1 of Order XLV. of the Rules of Court, 1875, is this:—"Where a judgment is for the recovery by or payment to any person of money, the party entitled to enforce it may apply to the Court or a Judge for an order that the judgment debtor be orally examined as to whether any and what debts are owing to him, before an officer of the Court, or such other person as the Court or a Judge shall appoint; and the Court or Judge may make an order for the examination of such judgment debtor, and for the production of any books or documents." It appears that this clause is copied in substance from the 60th section of the *Common Law Procedure Act*, 1854, which enacts that, "It shall be lawful for any creditor who has obtained a judgment in any of the superior Courts to apply to the Court or a Judge for a rule or order that the judgment debtor shall be orally examined as to any and what debts are owing to him before a Master of the Court, or such other person as the Court or Judge shall appoint; and the Court or Judge may make such rule or order for the examination of such judgment debtor, and for the production of any books or documents. . . ." Now, considering that that is a power which has been in force ever since 1854, it is certainly somewhat remarkable that no authority can be produced on either

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side as to how that examination ought to be conducted, or to what extent it can be justifiably carried. But the Plaintiffs in this case, availing themselves of that power, have obtained an order for the examination of the Defendant. Now the only subject on which he was to be examined was, what debts are owing to him. It appears that Mr. *Kekewich* conducted this examination; and it does appear to me that this is a power which is to be strictly construed. The object of this examination evidently is for the purpose of ascertaining from the judgment debtor what debts are owing to him, in order that the judgment creditor may attach those debts. It is in the nature of a discovery; and it appears to me very much like the discovery of documents where a defendant is asked what documents he has, and he sets out what documents he has: but you cannot cross-examine him upon that. You must take his statement to be correct. Now here, where you are to cross-examine him as to what debts are owing to him, I think you may go to this extent: you may ask him, "What debts are owing to you?" and if he gives you the answer you may very well say, "Does not your banker owe you any balance?" "Is there not a balance due to you on a contract in which you are engaged?"—and he is certainly bound to answer; but it does appear unquestionable that Mr. *Kekewich* here thought himself at liberty to go beyond the mere object of asking what debts are owing, because he asked him, "Are you carrying on any business at the present time?" I do not think, under the circumstances of the case, it was necessary to ask him whether he was carrying on business at the present time. Then he was asked, "Are any debts owing to you?" Then he was asked, "Are you a contractor? Is any money now due to you on any contract now completed?" He said, "I do not understand the question. No money is now due to me under any contract except the contract above referred to." Then he is asked, "Have you any contracts pending?" Then he says, "I shall answer no questions except as to what debts are owing to me." Then there is this, "Are you not a contractor by profession?" Now why should he be asked whether he is a contractor by profession? They knew perfectly well what he was; they knew perfectly well all about him, and all they wanted to know was what debts were owing to him, in order that they might

exercise the power of issuing an attachment against those debts. I think, therefore, the examination was carried beyond the object authorized by the rule, but I am also very much impressed by the opinion that Mr. *Strousberg*, being advised by counsel, refused to answer questions which, I think, he might very well have answered. However, my construction of the Act is that they were not at liberty to make a general examination. With every respect for Mr. *Kekewich*, I think he went there rather in the spirit of a cross-examiner than as a mere examiner as to what debts were owing to Mr. *Strousberg*. The object of the rule is simply to ascertain whether a debtor has any debts owing to him in order that they may be attached. To that question, in my opinion, the questions ought to have been confined. He might have been asked, "What debts are owing to you?" And he might have said, "*A. B.* owes me so much money, and *C. D.* owes me so much money." If the examining counsel were not satisfied with that, he might have asked, "Have you any balance at your bankers?" and take his answer, "Yes or no." Therefore I think the examination went beyond its just bounds. At the same time, I think the answers were more curt than they might have been. Therefore, upon the whole, I cannot make any order that Mr. *Strousberg* should attend to answer these general questions which were put to him. He must attend for the purpose of answering the simple question authorized by the rule—what debts are owing to him—and no others. I think there has been over-zeal on the part of the Plaintiffs. I think they have been carrying the matter a little too far, and I rather had an inclination to dismiss their motion with costs; but on the whole, considering all the circumstances, I think it will be better to dismiss it without costs.

C. A.

The Plaintiffs appealed from this decision. The appeal was heard on the 4th of November.

Glasse, Q.C., *Kekewich*, Q.C., and *H. A. Giffard*, for the Appellants:—

If the Respondent is entitled to restrict the examination to the simple question as to whether any debts are due to him, the order will be a nullity. We submit he is bound to answer all ques-

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tions relevant to the subject-matter which will tend to give the Plaintiffs the discovery they seek, otherwise what is the use of requiring him to attend with and produce books, vouchers, documents, and the like?

Higgins, Q.C., and *Medd*, for the Respondent:—

The order is a very stringent one, and must be construed strictly. The Respondent has complied with the order made against him. The questions put were quite irrelevant to the subject-matter.

JESSEL, M.R.:—

I think this appeal must succeed. As I understand the rule, the examination is to be "as to whether any and what debts are owing to the judgment debtor." That means exactly the same thing as "touching the debts owing the judgment debtor," which was the form of the order that used to be issued under sect. 60 of the *Common Law Procedure Act*, 1854. Any question, therefore, fairly pertinent to the subject-matter of the inquiry, which means put with a view to ascertain so far as possible, by discovery from a reluctant defendant, what debts are owing to him, ought to be answered by the defendant. I am of opinion that all the questions asked were fair questions in that sense, and fairly pertinent and properly asked with a view of ascertaining from the Defendant what debts were owing to him, and that they ought all to have been answered. I am further of opinion that he ought to answer all similar questions fairly directed to that end, and that the order asked ought to have been made by the Vice-Chancellor. He must answer all questions fairly directed to ascertain from him what amount of debts is due, from whom due, and to give all necessary particulars to enable the Plaintiffs to recover under a garnishee order. I think therefore that the order asked for below should be made now, and that the Respondent should pay the costs of the appeal.

JAMES, L.J.:—

I am of the same opinion. The examination is not only intended

to be an examination, but to be a cross-examination, and that of the severest kind.

COTTON, L.J. :—I agree.

Solicitors for Appellants: *Freshfield & Williams.*
Solicitors for Respondent: *Lee, Houseman, & Brodie.*

Applied. SHARER *v.* WALLACE. [1950] 2 All E.R. 463.

AUGUSTINUS *v.* NERINCKX.

[1880 A. 22.]

Practice—Particulars of Demand.

The administratrix of *A.*, by statement of claim in an action against the administratrix of *G.*, alleged that an arrangement had been made between *A.* and *G.* that sums contributed by them for the purpose of being lent to or applied for the benefit of *C.*, to enable him to carry on a litigation, should be treated as a joint transaction, and that as soon as *C.* had established his title to the property for which he was suing, and could repay the advances made him, the advances made by *A.* and *G.* should be repaid out of the moneys recovered from him; that during the litigation *A.* advanced, in pursuance of this arrangement, sums amounting to about £27,000; that the advances made to *C.* were made through *G.* and in his name; that the Defendant had recovered a judgment against *C.* for the advances to him, and that a sum had been set apart in a suit in Chancery in satisfaction of this judgment. The Plaintiff claimed that it might be declared that the loans by *G.*, in respect of which the judgment was recovered, were transactions for the joint benefit of *A.* and *G.* as partners, and to have the sums contributed by them respectively ascertained; and asked that the Plaintiff might be declared entitled to a share in the benefit of the judgment, and in the fund set aside to satisfy it. The Defendant, before putting in a defence, applied for an account, with dates and items of the particulars of the £27,000 mentioned in the statement of claim, and *Pollock*, B., made an order accordingly :—

Held, on appeal, that the action not being a mere legal demand for an ascertained sum, but an equitable claim for an amount to be ascertained by an account, the particulars asked for were not required to enable the Defendant to frame her defence, and that the Plaintiff ought not to be ordered to furnish them.

THE Plaintiff in this action in the Chancery Division was the administratrix of *D. Augustinus*, who died in June 1877, and the Defendant, the administratrix of *P. Van Gheluwe*, who died in De-

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cember 1866. The allegations of the statement of claim were to the following effect: That in 1859 *Francisco Crispin* instituted a suit of *Crispin* v. *Doglioni* in Chancery, to administer the English personal estate of *Henry Crispin*, a Portuguese, who had carried on business in *England*. That *Francisco Crispin* claimed the personal estate as son of *Henry Crispin*. That in the same year *F. Crispin* instituted a suit in the Court of Probate to obtain letters of administration to the estate of *Henry Crispin*, his right to which was disputed by *Maria Doglioni*, who set up a will. That before 1859 litigation between the parties had gone on in *Portugal*, and *F. Crispin* had established his title to the Portuguese personalty. That ultimately, in July 1866, the House of Lords affirmed a decision of the Court of Probate in favour of *F. Crispin*, whose title to the personal estate in *England* was thereby established. That during this protracted litigation *Gheluwe* had from time to time advanced sums of money to *Francisco Crispin*, but from want of means was unable to render him all the pecuniary assistance he required. That *Gheluwe* applied to *Augustinus* to assist him in advancing money to *F. Crispin* and in applying money to be used for his benefit. That an arrangement was made between them that the sums contributed by *Gheluwe* and *Augustinus* respectively for those purposes should be treated as a joint transaction, and that as soon as *F. Crispin* established his title to the personal estate of *H. Crispin* in this country, and was able to repay the advances made to him and the sums applied for his benefit, the amounts respectively so lent and applied by *Gheluwe* and *Augustinus* respectively should be ascertained, and the sums contributed by them respectively repaid to them out of the money which should be recovered from *F. Crispin*. The claim proceeded to allege, in par. 7, that "The said *Desiré Augustinus* accordingly, in pursuance of this arrangement, during the progress of the said litigation, from time to time contributed money for the purpose of the same being lent to the said *F. Crispin*, or applied for his benefit as aforesaid, and the total amount of the sums so contributed down to the death of the said *P. Van Gheluwe* was about £27,500." That the advances made to *F. Crispin* were all made by and in the name of *Gheluwe*, *Augustinus* not wishing his name to appear. That *Gheluwe* died in 1866, and on the 25th of March, 1867, a decree

in Chancery was made for the administration of his estate. That an action was brought by *Alice Nerinckx* (the present Defendant), as administratrix of *Gheluwe*, against *F. Crispin*, to recover the amount advanced to him or applied for his benefit by or in the name of *Gheluwe*, and that on the 16th of July, 1869, judgment was recovered against him for £11,465. That on the 17th of March, 1876, an order was made in the suit of *Crispin* v. *Doglioni* by Vice-Chancellor *Bacon*, that £16,300 £3 per Cent. Annuities should be carried over to a separate account, "The account of *Alice Nerinckx*, subject to the claim of *G. Glegg* and *R. Pilkington*," in full satisfaction of the judgment of the 16th of July, 1869; and an inquiry was directed whether *Glegg* and *Pilkington* respectively were entitled to any and what portions of it. The Plaintiff claimed to have it declared that the loans and application of moneys by *Gheluwe* in respect of which the judgment of the 16th of July, 1869, was recovered, were transactions for the joint benefit of *Gheluwe* and *Augustinus*, and in which they were interested as partners, and that the amount of the sums contributed by *Gheluwe* and *Augustinus* respectively might be ascertained, and that the Plaintiff might be declared to be entitled jointly with the Defendant to the benefit of the judgment, and to a proportion of the funds standing to the said separate account in *Crispin* v. *Doglioni* corresponding to the proportion contributed by *Augustinus* of the total amount contributed by him and *Gheluwe* for *F. Crispin's* purposes; or in the alternative that it might be declared that the Plaintiff was entitled to receive the sums contributed by *Augustinus* with interest out of the funds representing the moneys recovered by means of the judgment, and that it might be declared that the Defendant was trustee of the judgment for the Plaintiff to the extent of the sums contributed by *Augustinus*, with interest thereon. The Plaintiff further claimed that the sums which, according to such declaration as might be made as to the Plaintiff's rights, might be ascertained to be due to the Plaintiff, should be paid out of the funds standing to the separate account, and that the Defendant might be ordered to concur in or consent to all such applications in *Crispin* v. *Doglioni* as might be necessary for that purpose, and that those funds might be transferred to a separate account in this action, or that a

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receiver of them might be appointed and an injunction granted to restrain the Defendant from dealing with them.

The statement of claim was delivered on the 17th of March, 1880. The time for delivering a statement of defence was repeatedly enlarged, and was ultimately, on the 16th of July, extended to the 27th of August.

On the 29th of July the Defendant took out a summons for delivery of an account in writing, with dates and items, of the particulars of the sum of £27,000 mentioned in the 7th paragraph of the statement of claim. This summons was adjourned to be heard by the Vacation Judge, and on the 25th of August Baron *Pollock* made an order directing that the Plaintiff should deliver such an account as was asked for, and that, unless such particulars were delivered within ten days after service of the order, all further proceedings should be stayed until the delivery thereof; and it was ordered that the time within which the Defendant was to deliver her statement of defence should be extended to ten days after the delivery of the particulars. On the 7th of September the Judge gave the Plaintiff leave, under sect. 50 of the *Judicature Act*, 1873, to go direct to the Court of Appeal.

Sir *H. Jackson*, Q.C., and *Grosvenor Woods*, for the Plaintiff:—

The Defendant is merely seeking discovery, and her proper mode of obtaining it is to deliver interrogatories under Order XXXI., rule 1: *Saunders* v. *Jones* (1). This she can do as soon as she delivers her defence.

[JESSEL, M.R.:—Order XXXI., rule 1, is only permissive.]

It was not intended by the Legislature that at a stage of the action in which a defendant cannot get discovery by interrogatories he should get it by a summons for particulars, which are not necessary to enable him to put in his defence.

JESSEL, M.R.:—My practice has been to follow, in what may be called common law actions, the old practice of the Common Law Courts as to particulars, but in actions such as under the old practice could only be brought in Chancery, the practice of the Court of Chancery.

(1) 7 Ch. D. 435.

COTTON, L.J. :—If the Defendant is seeking discovery before he puts in his defence, his application is premature. If he only wants the pleadings made sufficiently distinct to enable him to frame his defence properly, he ought to be held entitled to the particulars.]

We do not contend against that, but we say that the particulars now asked are perfectly unnecessary for the purpose of putting in a defence, the matter being one of account. There is nothing in the Judicature Acts or in the Rules that bears upon the question, and therefore each Division will follow its old practice. This order is not according to the Chancery practice, nor should it be made at common law, for the case is not within the *Common Law Procedure Act*, 1852, Sched. B.

[JESSEL, M.R. :—The Court is not confined to those cases. Before that Act was passed the Court, by its own inherent jurisdiction, often ordered particulars to be delivered.]

Alexander, in support of the order :—

This is a mere common law demand, and if the action had been brought in a Common Law Division, the ordering particulars would have been a matter of course.

[JESSEL, M.R. :—I doubt whether this is a mere common law demand.]

At all events a defence cannot be satisfactorily framed without our knowing the particulars asked for.

JESSEL, M.R. :—

This is an appeal from an order of Baron *Pollock* directing the Plaintiff to deliver an account in writing, with dates and items of the particulars of the sum of £27,000 mentioned in the 7th paragraph of the statement of claim. It appears to me that the attention of the learned Judge was not sufficiently directed to the nature of the action. It is not an action for a definite sum of money, but is an action by a legal personal representative in respect of advances alleged to have been made by her intestate under an agreement in the nature of a partnership agreement, and

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seeks to establish a lien upon a certain fund for what shall be found due. No specified sum is claimed, but an account is asked for, and in order to enable the Defendant to put in a defence to such an action, it is not necessary that she should know the particulars of the sums advanced and the times when they were advanced. It is not a mere common law action to recover sums of money lent. The Defendant may possibly hereafter be entitled to obtain by an interrogatory the information she seeks, but that information is not necessary to enable her to frame her defence, and I am of opinion that the order cannot stand.

JAMES and COTTON, L.JJ., concurred.

Solicitors: *G. S. & H. Brandon; Keighley, Shea, & Bevan.*

C. A. 1880 V.-C. M. *July* 24; *Aug.* 5. C. A. *Nov.* 5.

In re VAN HAGAN. SPERLING *v.* ROCHFORT.

[1877 V. 53.]

Power of Appointment—Will executing Power—Death of Appointee before Testatrix—Real Estate.

17 Ch D 154 155 18 Ch D 523 22 Ch D 239

A testator gave to his mother a general testamentary power of appointment over real estate, provided that, should his mother die without any will, then the estate was to go to *E. C.* The mother by will gave all her real estate, including that over which she had any power of appointment, to trustees in trust for *G. G.*, who died in her lifetime:—

Held, by *Malins*, V.C., that, the property being real estate, the case was not governed by authorities having reference solely to personal property; that the mere circumstance of the testatrix making an appointment which failed did not shew an intention to make the appointed estate part of her general property, and that the estate went as in default of appointment.

Held, on appeal, that for this purpose there was no distinction between real and personal estate, and that the property belonged to the trustees of the mother's will, subject to a resulting trust for her heir-at-law (if any).

AT the time when *Henry Van Hagan* made his will certain real estates, including a messuage, lands, and premises, known as *Brampton Place*, stood limited as to one-third share thereof to

the use of his mother, *Elizabeth Clara Van Hagan*, for life, with remainder to the use of *Henry Van Hagan* in fee. The other two-thirds stood limited to the use of *Henry Van Hagan* for life, and after his death, as to one moiety, to the use of his wife, *Harriet Van Hagan*, for life, and subject to that estate the two-thirds were limited to the use of trustees in fee upon trusts for the children of the marriage, and, in default of children, as to the moiety in which *Harriet Van Hagan* had no life interest, in trust for *Henry Van Hagan* in fee, and as to the other moiety, in trust for *Harriet Van Hagan* in fee, if she should survive *Elizabeth Clara Van Hagan*, which event happened.

Henry Van Hagan made his will in November, 1826, containing the following provision: "It is my will, provided there be no child or children born to me by my wife *Harriet*, then that my said mother, upon and after my said wife's death, the same to take effect, may will and bequeath of her own free choice and consent that one-third part of the rents, income, and interest of my real property which she by my father's will had a life interest in." The testator then, in the event of his having no child, devised another third share, after the death of his mother and wife, to *Edward Hyde Clarke* upon certain conditions, and proceeded as follows: "Provided always that should my mother die without any will, then, in addition to the above-named one-third, I do hereby will and bequeath that one-third which my mother might have willed, to the same *E. H. Clarke* upon conditions only as follows." The condition referred to was that *E. H. Clarke* should pay a certain annuity.

The testator died in 1832, without having had any child by his wife *Harriet*.

Elizabeth Clara Van Hagan, the mother of the testator, made her will in March, 1853, which contained the following clause: "And as to and concerning all real estate whatsoever and wheresoever over or to which I or any person or persons in trust for me am, is, or are seised, or in any way entitled, or over which I have (either under or by virtue of the said last will and testament of my deceased son *H. Van Hagan*, or of any codicil thereto or otherwise howsoever), or over which I shall have any power to dispose, being, as I understand, certain parts, shares, estates or interests

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of and in the several properties hereinafter mentioned which I have liberty to dispose of by my will under or by virtue of the said will of my said son, or some other instrument or instruments, but under or by virtue of whatsoever power or authority I am enabled, or howsoever I may be entitled so to do, I give, devise, limit, direct, and appoint the same unto and to the use of *John Sperling*, *Frederick Luard Wollaston*, and *George Sperling*, their heirs and assigns, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations hereinafter expressed and declared or contained of and concerning the same." The testatrix then declared trusts of one moiety of *Brampton Place* for Mrs. *Rochfort* for life, and after her death for her daughter *M. C. Rochfort*, but if she should die in the lifetime of her mother, or under twenty-one, then in trust for her brothers who should attain twenty-one, as tenants in common, and declared trusts of the other moiety as follows: "And as to the other moiety or equal half part of and in my estate, part, share and interest in the said house, lands, and premises called *Brampton Place*, in trust for the said *George Rowney Green*, his heirs and assigns for ever; and I would here have it understood that none of the trusts declared by this my will in regard to the real estate so as aforesaid devised or appointed can (as I believe) take effect until after the decease of my daughter-in-law *Harriet Van Hagan*, widow of my said son, and accordingly, unless I have misunderstood my rights in this respect, I will and direct that such trusts shall not take effect until her decease." And the testatrix appointed *John Sperling*, *F. L. Wollaston*, and *G. Sperling*, executors of her will.

Elizabeth Clara Van Hagan died on the 21st of April, 1860. Two of her trustees survived her, but *George Rowney Green* died two days before her. *Edward Hyde Clarke* died in 1873, and *Harriet Van Hagan* in 1877.

The question now raised, upon adjourned summons, was whether the share in *Brampton Place* appointed in trust for *George Rowney Green*, went in default of appointment to *Edward Hyde Clarke*, or whether it went as undisposed of real estate of Mrs. *Van Hagan*.

The summons came on to be heard before Vice-Chancellor *Malins* on the 24th of July, 1880.

Joshua Williams, Q.C., and *E. S. Ford*, for the Plaintiff, who was the representative of the surviving trustee of the will of *Elizabeth Clara Van Hagan*:—

There is no doubt that the will of Mrs. *Van Hagan* was a due execution of the power of appointment given her by the will of *Henry Van Hagan*, and therefore the proviso "should my mother die without any will," which is found in *Henry Van Hagan's* will, does not apply. The testatrix has mixed up this property, over which she had a general power of appointment, with the rest of her property, and has made it her own. Here the appointment is unto and to the use of trustees upon the trusts of the will, and it has always been held that an appointment to *A.* in trust for *B.*, which trust fails as to the beneficial interest, will nevertheless operate as a good appointment to the trustee, who holds upon the same trusts as if it had been the appointor's own property. The authorities are all in favour of this view of the case: *Chamberlain* v. *Hutchinson* (1); *Attorney-General* v. *Brackenbury* (2).

The principle is, that where an appointor shews an intention to exercise the power over the subject-matter of the power, he converts the whole into his own estate: *Goodere* v. *Lloyd* (3), *Lefevre* v. *Freeland* (4), *Brickenden* v. *Williams* (5), *Wilkinson* v. *Schneider* (6), and *In re Pinède's Settlement* (7). In the case of *Easum* v. *Appleford* (8) the testatrix distinguished throughout her will between her own property and that over which she had a power of appointment, and had shewn an intention not to make the latter, part of her general estate, and on that account it went to the persons entitled in default of appointment. In *In re Hoskin's Trusts* (9) it was held to be a settled rule that where the donee of a general power of appointment over a fund of personalty makes an appointment of the fund by will, and appoints an executor, the executor is entitled to receive the appointed fund.

[They also referred to *Farwell* on Powers (10).]

(1) 22 Beav. 444.
(2) 1 H. & C. 782.
(3) 3 Sim. 538.
(4) 24 Beav. 403.
(5) Law Rep. 7 Eq. 310.
(6) Law Rep. 9 Eq. 423.
(7) 12 Ch. D. 667.
(8) 10 Sim. 274; 5 My. & Cr. 56.
(9) 5 Ch. D. 229; 6 Ch. D. 281.
(10) Page 191.

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J. Pearson, Q.C., and *Rodwell*, Q.C., for the devisee of *Edward H. Clarke*:—

All the cases cited refer exclusively to personal property; there is not a single authority to be found where the same rules have been applied to real estate. Where a testator gives property to an executor, or appoints an executor, it is evidence of an intention that the property shall be subject to the payment of debts and legacies, but this applies only to personal estate. Under the will of *Henry Van Hagan* it is provided that should his mother die without any will the property was to go to *Edward Clarke*. Those words must evidently mean, should his mother die without effectually disposing of the property by a due execution of the power. She has executed the appointment, but she has not disposed effectually of the property; therefore, in effect, she has died without any will as to this particular property. *Henry Van Hagan* meant that if his mother did not appoint any individual to take the property whom she preferred to *Clarke*, then *Clarke* was to have it, but it never could have been his intention, nor his mother's intention, to allow the property to go away from *Clarke* to her heir-at-law, particularly when it seemed probable that she would have no heir-at-law. This is a question of intention, and unless it can be shewn that the testatrix meant the property to go away from *Clarke* in case her devisee should die before her, it must go to the person nominated by the donor of the power to take it in default of appointment.

There is a case directly opposed to the authorities cited, which is *In re Davies' Trusts* (1). Vice-Chancellor *Wickens* there held it to be settled law that where a testator with a general power of appointment gives legacies and appoints an executor, he must be taken as exercising his general power to the extent to which the fund subject to it is required to make the legacies effective, and that a testator must be taken in all cases to exercise the power to the extent only to which the direction is effectual. The Vice-Chancellor there held that the fund upon the lapse of the legacies went in default of appointment. Then *Easum* v. *Appleford* (2) is also in our favour, but all these cases were applied to

(1) Law Rep. 13 Eq. 163. (2) 5 My. & Cr. 56.

personal estate, and are not wanted to guide the decision of the Court in this case, which relates only to real estate.

Joshua Williams, in reply.

MALINS, V.C.:—

I cannot dispose of this case finally till I look at the numerous authorities which have been cited, and I therefore shall reserve my final judgment; but in the meantime I may say that I think the case admits of no doubt whatever as to what ought to be done. It is only if I am bound by the authorities which Mr. *Joshua Williams* and Mr. *Ford* have relied on, that I shall depart from that which, in my opinion, will carry into effect the intention of the testator and the testatrix.

The case is very short, and, unless I intimate hereafter that I am bound by the authorities contrary to my own opinion, this will be my judgment:—[His Lordship, having referred to the material parts of the two wills, continued:—]

Now, this will being made in 1853, the testatrix died on the 21st of April, 1860, but *George Rowney Green*, the appointee, died two days before her. It is agreed, therefore, on all hands that the appointment to him fails. He cannot take the property, and undoubtedly, there being an appointment, where the appointee dies in the lifetime of the testator that is no appointment at all, and she has not made a will disposing of the property.

In this sense, therefore, Mr. *Joshua Williams* seems to concede in his reply that if there had been no appointment to the trustees, the appointment to *G. R. Green* having failed, there would be no appointment at all, and there being no appointment by the mother, it would properly go, as in default of appointment, to *E. H. Clarke*. But the argument is that she calls this estate her own. She gives it to trustees. No doubt she does call it her own, and it was her own in a certain sense, that she had just the same control over it by her will as if it had been her own, but she so calls it only for the purpose of disposing of it in favour of *G. R. Green*. She was the absolute owner, but did she intend to do more by the will than give the property to *G. R. Green?* I am clearly of opinion that she never intended anything else. The only object of the will was

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to give the property to *G. R. Green*, and knowing the will of her son, from whom she derived the power, she knew if she did not make a will giving the property to *G. R. Green*, then *E. H. Clarke* was the person to take in default of appointment under the son's will. What intention can be attributed to her? Did she intend to treat it as her own, and for what purpose?—not to pay her debts or to do anything beneficial with it, but dying without any residuary clause and making no other disposition of it, did she intend it to descend to some unknown heir?—and it is even doubtful whether she died with an heir. In that case the question would be, she putting it in the hands of trustees, whether, under the doctrine of *Burgess* v. *Wheate* (1), they having the legal estate unquestionably, as there are no *cestuis que trust*, can retain it for their own benefit, that is to say, the survivor *John Sperling* will have the property if there is no heir-at-law.

Now, undoubtedly, with regard to personal property, there is a long array of authorities which have been cited establishing that where the testatrix or testator having a power over personal estate, gives it to the executors and shews an intention to make it part of the personal estate applicable to the payment of legacies or debts, there the will makes the property the testator's own, and being his own, if the appointment fails, it forms part of his general estate and assets in the hands of the executors; but with regard to the case before Sir *L. Shadwell* and Lord *Cottenham* of *Easum* v. *Appleford* (2), the Court drew a distinction, and I am inclined to think that affords a better rule of construction than any other case. But, at all events, this is perfectly clear, that there is not a single case in which this doctrine has been applied to real estate, and I should be very reluctant to extend such a doctrine, which, in my opinion, defeats the intention in most cases of the appointors; and, there never having been a case that has extended the doctrine to real estate, I should be very reluctant to extend that myself, because I say again in almost all cases it defeats the intention.

Therefore, there being no such case, and it being to my mind perfectly clear she only intended to displace *E. H. Clarke* for the purpose of putting *G. R. Green* in his place, and, having failed to put him in his place in consequence of his death in her lifetime,

(1) 1 Eden, 177. (2) 10 Sim. 274; 5 My. & Cr. 56.

the gift, in default of appointment, takes effect; consequently, unless I find myself on looking into the cases bound to come to an opposite conclusion, I shall without doubt or hesitation come to the conclusion that the person entitled to this property is the one who takes in default of appointment by her, she having attempted to make an appointment, and that having failed by the death of the appointee in her own lifetime.

Aug. 6. MALINS, V.C. :—

This case was argued on the 24th of July last, and at the close of the argument I expressed my opinion, and said that many cases having been cited I would look at them before my judgment should be considered final.

A great number of cases were cited, and they were all cases of personal estate, and they proceeded on this general principle, that where a person has a general power of appointment over personal estate and appoints the estate to the executors, it is always a question of intention whether the power was intended to be exercised or not. I think the fair result of all the cases is this, that it is a question of intention; and when the subject of the power is personal estate and the appointment is made to the executors of the donee of the power, the presumption is, that it was intended to make the fund part of the personal estate of the donee.

Among the numerous cases cited I will refer to one or two only. The first I will take is the case of *Goodere* v. *Lloyd* (1) as a specimen of the whole, and which in fact all the others have followed. That was a case in which the testatrix *A.*, having power to appoint £700, appointed that sum to her executors, but did not declare expressly any trusts of the same. The result was it did not go to any persons; and the question was whether it formed part of the personal estate of the donee of the power, or whether it went as in default of appointment. Sir *Lancelot Shadwell* (2) says, "My notion is that, where there is a gift to executors, in trust, the executors take the gift as part of the testatrix's personal estate; and, if the legacies given by the will are not sufficient to exhaust the personal estate, then that the surplus goes to the persons

(1) 3 Sim. 538. (2) 3 Sim. 542.

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who are entitled to the testatrix's residuary estate." Accordingly, he declared as to the £700 in question that, by the appointment to the executors, it became the personal estate of the donee of the power.

The same point was decided by Lord *Romilly* in *Chamberlain* v. *Hutchinson* (1). A lady had a general power of appointing a trust fund by deed or will, and in default of appointment half was limited to *A.* and the other half to *B.* It is precisely the same. By her will she appointed the fund to her executors; the Master of the Rolls (Lord *Romilly*) says: "In the first place there is a general appointment of it by the will to her executor, so as to make it part of her personal estate, and an express direction to pay certain legacies out of the appointed fund. She treats the whole as part of her personal estate, and blends the whole so as to make it part of her general personal assets, and liable to the payment of her debts, legacies, costs of administration, and probate, and all other charges which necessarily fall on the general personal estate." On these grounds he considered the appointment took effect in favour of the executors.

I need not particularly refer to the details of the other cases, but the doctrine was followed in *Lefevre* v. *Freeland* (2), in *Brickenden* v. *Williams* (3), which was a decision of Lord Justice *James* when Vice-Chancellor, and in *Wilkinson* v. *Schneider* (4), which is also his decision; and, finally, the case that I refer to on this branch of it is *In re Pinède's Settlement* (5). There the Master of the Rolls, Sir *George Jessel*, in coming to the same conclusion, cites with approbation (and I should desire to add my opinion also of approbation) the manner in which the law is stated by Vice-Chancellor *Chatterton*, Vice-Chancellor of *Ireland*. The Master of the Rolls says, "I do not know that the case can be better stated than in the way in which it is stated by Vice-Chancellor *Chatterton* in *In re De Lusi's Trusts* (6), to which I have been referred: 'The question in all cases of the class now before me is one of intention, namely, whether the donee of the power meant by the exercise of it to take the property dealt with out of the

(1) 22 Beav. 444, 448.
(2) 24 Beav. 403.
(3) Law Rep. 7 Eq. 310.
(4) Law Rep. 9 Eq. 423.
(5) 12 Ch. D. 667, 672.
(6) 3 Ir. L. Rep. 232, 237.

instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed.' " Then the Master of the Rolls, following these other authorities which I have cited, comes to the same conclusion, that the appointment being to the executors, made it part of the personal estate of the donee of the power. I think the authorities may be considered perfectly uniform, and they are all found neatly collected in Mr. *Farwell's* very useful treatise on Powers, which was cited by Mr. *Joshua Williams.*

But even with personal estate the conclusion is different where the donee of the power draws the distinction between his own property and that over which he has a power of appointment, which was the case in *Easum* v. *Appleford* (1), decided by Sir *Lancelot Shadwell,* and on appeal affirming that decision by Lord *Cottenham* (2). There the point was this. The testatrix had a power of appointment over £3000, which had got mixed up with her other property. By her will she carefully gave £2700, part of the fund over which she had the power of appointment, and another small sum; and throughout the will she shewed a distinction between that which was her own property strictly, and that over which she had a power of appointment. I need only read one short passage from Lord *Cottenham's* judgment, in which he says this: "This consideration will shew, at once, how untenable is the argument urged at the bar, that the donee of the power having directed the transfer of the fund from the trustees appointed by the donor, to others named by her will, had, by so doing, made the fund part of her estate. No doubt, she might have made these funds part of her general estate, but it is clear that she never intended to do so. She, throughout, distinguishes between her own property, and that over which she had the power of appointing; and if, in the events which have happened, the £2700 £3 per Cents was appointed by her will, that must have been effected, not by any words relating to her own property, but by the words in the residuary gift, 'And also all the residue of the said trust funds which shall remain after paying and satisfying the several legacies of stock hereinbefore directed to be paid.' " So that although it is a rule as I have stated it, that there is a general presumption by appointing to

(1) 10 Sim. 274. (2) 5 My. & Cr. 56, 60.

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executors that the property is intended to be made part of the personal estate, that would certainly never be where the will shews a distinction between the property of the testator and that over which there is a power.

But this principle has never yet been extended to real estate, and has, in my opinion, no application to such estate.

Here the intention was merely to appoint to *George Rowney Green* in fee, and as he died in the lifetime of the testatrix the appointment to him failed, and the property went, as in default of appointment, to *Edward Hyde Clarke* under the will of the testator. This principle was acted upon even as regards personal estate by Vice-Chancellor *Wickens* in *In re Davies' Trusts* (1). In that case, "*S. D.*, who had, under the will of her late husband, a general power of appointment over a moiety of his residuary estate, by will, in 1869, after directing that her debts should be paid, and giving pecuniary legacies, bequeathed the residue of her personal estate, which she had any title to or interest in, unto her brothers and sisters, *M.*, *E.*, *W.*, and *J.*, equally, and appointed an executor." Two of them died in her lifetime, and the question was whether she had made it part of her general personal estate, or whether it remained the property, so far as the appointment failed, of the creator of the power. Vice-Chancellor *Wickens* draws a distinction, and explains in that case that the only object was to make the appointment. It was not made part of the general estate, and therefore it went as in default of appointment.

In this case, in my opinion, the property being real estate, the mere circumstance of making an appointment which failed does not shew an intention on the part of the testatrix to make this real estate part of her general estate, to pay her debts and so forth. The only object was to give the property to Mr. *Green*. Mr. *Green* cannot take it, because he died in her lifetime, and the result is, in my opinion, the appointment having wholly failed, the property goes as in default of appointment, under the will of the son who created the power, and forms, therefore, part of Mr. *Hyde Clarke's* estate.

C. A. The Plaintiff appealed. The appeal was heard on the 5th of November.

(1) Law Rep. 13 Eq. 163.

Joshua Williams, Q.C., and *E. S. Ford*, for the Appellant:—

The legal appointment takes the estate out of the will of *Henry Van Hagan*, and the person claiming in default of appointment has no equity to bring it back. There is no such distinction as the Vice-Chancellor has drawn between real and personal estate for this purpose. Real estate appointed under a general power is assets for payment of the debts of the appointor: *Fleming* v. *Buchanan* (1). The Plaintiff admits the title of Mrs. *Van Hagan's* heir-at-law, if one can be found; if not, we say that the trustees retain the estate for their own benefit: *Burgess* v. *Wheate* (2).

[JESSEL, M.R., referred to *Onslow* v. *Wallis* (3), where property vested in a trustee for the testator having been devised to trustees upon trusts which failed, the new trustees were held entitled to a conveyance from the original trustees.]

The cases as to personalty are clearly in our favour: *Brickenden* v. *Williams* (4); *Wilkinson* v. *Schneider* (5); *In re Pinède's Settlement* (6).

[JESSEL, M.R.:—The true rule appears to me to be that enunciated in *In re De Lusi's Trusts* (7): "The question in all cases of the class now before me is one of intention, namely, whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed."]

Here the intention to deal with the property as her own is manifest. She mixes it with her other property and speaks of the whole as hers. There can be no distinction for this purpose between realty and personalty. There cannot on failure of the trust be any resulting trust for the persons claiming under the original settlement: *Sugden* on Powers (8); *Goodere* v. *Lloyd* (9); *Chamberlain* v. *Hutchinson* (10). The rule for which we contend

(1) 3 D. M. & G. 976.
(2) 1 W. Bl. 123; 1 Eden, 177.
(3) 1 Mac. & G. 506.
(4) Law Rep. 7 Eq. 310.
(5) Ibid. 9 Eq. 423.
(6) 12 Ch. D. 667.
(7) 3 Ir. Law Rep. 232.
(8) 8th Ed. p. 467, para. 35.
(9) 3 Sim. 538.
(10) 22 Beav. 444.

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was broadly laid down by Vice-Chancellor *Wickens* in *In re Davies' Trusts* (1), in accordance with *Wilkinson* v. *Schneider* (2).

J. Pearson, Q.C., and *Rodwell*, Q.C., for the devisee of *E. H. Clarke*, in support of the order:—

The question in the cases relating to personalty is stated to be whether the appointor intended to make the appointed property part of her own estate, and the same test must be applied to realty. If the fact of an appointment making the property assets for payment of debts was decisive, the question could never arise.

[JESSEL, M.R.:—It might still arise in the case of a married woman, who cannot in general have debts.]

As regards personal estate when it is given to executors, as in *Brickenden* v. *Williams* (3), and is dealt with along with the appointor's personal estate, legacies being given out of both as a mixed fund, it would be difficult to say that there was not an intention to make the fund part of the appointor's estate. Here, we contend that the testatrix intended to make an appointment only for a limited purpose, which has failed.

[JAMES, L.J.:—Suppose an appointment by deed was made by way of mortgage, in whom would be the equity of redemption?]

We submit in the persons entitled in default of appointment.

[JAMES, L.J.:—I doubt that.]

It is like appointing so much money by way of charge on the property. It is not a reasonable view to adopt a construction which displaces an object of the settlor's bounty for the benefit of a person not contemplated either by the settlor or the appointor. It is true the trustees have the legal estate, but they admit themselves to hold it as trustees, and the question is for whom? When the object which the testatrix contemplated has failed, the reasonable view is that they are trustees for the persons entitled in default of appointment. Then the directions in the will as to payment of debts tend to shew that this property was not intended to be assets.

(1) Law Rep. 13 Eq. 163, 166, 167. (2) Law Rep. 9 Eq. 423.
(3) Law Rep. 7 Eq. 310.

[JESSEL, M.R.:—If it was not intended to be assets, why did not the testatrix give it to *Green* directly ?]

There were trusts of one moiety which made it reasonable to vest the whole in trustees. Vice-Chancellor *Wickens*, in *In re Davies' Trusts* (1), intimates that there is great difficulty in holding that the intervention of a trustee makes any difference.

JESSEL, M.R.:—

This case has been decided by the Vice-Chancellor, not on any general ground of law applicable to the exercise of all general powers of appointment, but on the ground that there is a distinction between real and personal estate as regards the exercise of such powers. Now I wish to say, in the first place, that I think there are quite sufficient distinctions in our law between real and personal estate without introducing a new one for the first time, and if in the case of personal estate the exercise of a general power of appointment in favour of a trustee for a legatee who dies in the lifetime of the testator takes effect so as to make the property in substance the testator's own, I see no reason why the same rule should not apply to an appointment of real estate. In fact, to a slight extent, it appears to me that the case of real estate is the stronger of the two, because in the case of an appointment of real estate there is an actual legal estate carrying with it the right of possession which must be disturbed by those who claim the property under the limitations in default of appointment. The Vice-Chancellor does not suggest that, taking the law to be the same as regards both real and personal estate, the Appellant is not entitled to succeed.

Having thus disposed of the only reason for that decision, I will consider in a very few words (for it has been considered so often by myself and by the Lord Justice *James*, and by other Judges, that it is not right to go through all the cases) what the effect is of a testamentary appointment under a general power to a trustee in trust for a person who dies in the life of the testator, and therefore cannot take. In the first place, I will consider the intention. The intention of the testator is that the person whom

(1) Law Rep. 13 Eq. 163.

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I will call the beneficial legatee or devisee, shall take, and there being nothing in the will to shew that the case of dying in the lifetime, or lapse, was contemplated by the testator, the rule has always been that the testator did not contemplate it, but expected that the devisee or legatee would survive him and take accordingly. So that we have to deal with a case as to which there is in some sense no expressed intention, though there is an intention expressed that nobody shall take under the limitations in default of appointment contained in the settlement creating the power, the testator having, according to his belief, disposed of the property, both legally and beneficially, as against the persons claiming under those limitations.

Then the only question remaining is what is to become of the property in case the intention that the beneficial legatee or devisee shall take cannot have effect. That is a mere question of resulting trust. Resulting trust for whom? As already pointed out by Lord Justice *James* when Vice-Chancellor, it must either be for the original settlor or for the appointor, and, considering that a general power is for almost all purposes equivalent to property, and is so dealt with by the Legislature in the *Wills Act* as regards testamentary appointments, the fair and proper result, in my opinion, is to treat the trust as resulting to the appointor, so as to carry the property to the person or persons who would take his real or personal estate, as the case may be, or, to put it in the words of Vice-Chancellor *Wickens* in the case of *In re Davies' Trusts* (1), "It seems settled by the cases of *Chamberlain* v. *Hutchinson* (2) and *Wilkinson* v. *Schneider* (3), authorities which are binding on me, that a testamentary appointment under a general power to *A.* in trust for *B.*, which lapses as to the beneficial interest by *B.'s* death before the appointor, operates as a good appointment in favour of *A.*, who holds on the same trusts as if it had been the appointor's own property." There is this also to be said, that the gift to trustees is rational, if the testator knew that it would make the property part of his assets and liable to the payment of his debts. But there does not seem to be any sufficient motive for interposing a trustee when the beneficiary

(1) Law Rep. 13 Eq. 166. (2) 22 Beav. 444.
(3) Law Rep. 9 Eq. 423.

takes absolutely in the case of real estate. I do not, however, rely on that. I prefer to rest my judgment on the general principle which I have already stated.

JAMES, L.J.:—

I am of the same opinion. I concur cordially with the observation of the Master of the Rolls, that it would be very undesirable to re-create any distinction between personal and real estate, and very desirable not to re-create any distinctions between property and a general power, which, to the common apprehension of mankind, is exactly the same thing as property, and has for many purposes been treated as property.

With regard to the cases which have been cited, I have seen no reason whatever, after having read the judgment of the Vice-Chancellor and heard what has been said by the Respondent, for doubting the accuracy of my previous decisions in the cases of *Brickenden* v. *Williams* (1) and *Wilkinson* v. *Schneider* (2), in the latter of which cases I laid it down that it is not in these cases a question of intention as to what is to be done with the property, but a question of resulting trust. The intention is to execute the power and to take the appointed property out of the settlement, but when the power is once fully executed it is not a question of intention, because nobody can reasonably attribute any particular intention to a testator as to what was to be done in an event that was never in his contemplation. It is a question simply of a resulting trust—what will the law do in a state of things which has happened and as to which the appointor has not made any express provision. Then if the person having a power equivalent to property which would enable him to make that property his own, or make it part of his own estate—if such a person puts that property into the hands of any person for a purpose which only partially requires it, then the resulting trust, in my opinion, is for the person who appointed the trustees and who created the trust. They are trustees for him or her who appointed them trustees, and if there is anything which prevents the whole thing from being disposed of according to the trust, it is their duty to hand it back to the person who created the trust.

(1) Law Rep. 7 Eq. 310. (2) Law Rep. 9 Eq. 423.

C. A. 1880 *In re* VAN HAGAN. SPERLING *v.* ROCHFORT.

COTTON, L.J.:—

As I understand the judgment of the Vice-Chancellor, he decided this case on a distinction between real and personal estate in cases like the present. Certainly there is no case which justifies such a distinction, and I agree with the rest of the Court that we ought not to make such a distinction.

On what ground, then, ought the case to be decided? It is said that it is a question of intention, and, as has been said in former cases by the Lord Justice *James* and the Master of the Rolls, it is to a certain extent a question of intention, that is to say, you must see whether or no there is an intention expressed in the instrument exercising the power to dispose absolutely of the property by an exercise of the power of appointment. If you can shew that although there is an exercise of the power there is an intention expressed in the instrument that in the event of the beneficiaries not taking the property under the exercise of the power the original settlement is to remain, then of course it remains. That is an appointment for limited purposes with an intention shewn that in the event of those purposes coming to an end, or for any reason failing, then the original trust is to remain. But here it is absurd to say that we are to consider what the intention of the appointor was in the events which have happened. The events were never contemplated, because she appointed the property absolutely to a person whom she expected to survive her, and who, if he survived her, would put an end to all questions by taking the property absolutely, to the exclusion of everybody else.

In the events that have happened the question is no longer one of intention. The event that has happened was not within the contemplation of the testatrix, and the only question is, what the law under those circumstances will do. The power was exercised, and the property was entirely taken, both as regards the legal and beneficial interest, out of the original settlement. Those who claim under the original settlement cannot, in my opinion, claim it, and this being appointed by the testatrix to her trustees, and the purpose for which it was given to them, as expressed in the will, having failed by the death during her lifetime of the *cestui que trust*, the property goes by way of resulting trust to the person

who would be entitled to her real estate. That being so, the decision of the Vice-Chancellor, in my opinion, cannot be supported.

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A declaration was made that the property belonged to the surviving appointee, subject to a resulting trust for the heir-at-law, if any, of the testatrix.

Solicitors: *E. J. Rickards; Milne, Riddle, & Mellor.*

Ex parte CHARING CROSS ADVANCE AND DEPOSIT BANK. *In re* PARKER.

C. A. 1880 *Nov.* 11.

Bill of Sale—Statement of Consideration—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 8.

In the operative part of a bill of sale it was expressed to be made in consideration of £120 advanced upon its execution by the grantee to the grantor. In fact, only £90 was paid to the grantor, £30 being retained by the grantee for "interest and expenses." The execution of the deed was attested by a solicitor, and the attestation clause stated that before its execution the effect of the deed was explained by him to the grantor. At the foot of the deed, immediately after the attestation clause, there was a receipt, signed by the grantor, which stated that the £90, "together with the agreed sum of £30 for interest and expenses," made the sum of £120, "the consideration money within expressed to be paid":—

Held, that the receipt was not part of the deed; and that the deed did not set forth the consideration for it, and was therefore made, by sect. 8 of the *Bills of Sale Act*, 1878, void as against the trustee in the liquidation of the grantor.

Ex parte National Mercantile Bank (1) distinguished.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

On the 7th of November, 1879, *John Parker*, a builder at *Clapton*, executed a bill of sale of his furniture and other chattels to the *Charing Cross Advance and Deposit Bank*. The deed contained a recital that the mortgagor had applied to the mortgagees to advance him the sum of £120, which the mortgagees had

(1) 15 Ch. D. 42.

C. A. 1880 *Ex parte* Charing Cross Advance and Deposit Bank. *In re* Parker.

agreed to do upon the terms thereinafter expressed. And it was witnessed that, "in consideration of the sum of £120 by the mortgagees paid to the mortgagor at or before the execution hereof (the receipt of which said sum the mortgagor hereby acknowledges)," the mortgagor assigned unto the mortgagees his furniture and other chattels by way of security for the repayment of the £120 in the manner therein mentioned. In fact, £90 only was paid by the bank to *Parker* on the execution of the deed, £30 being retained by the bank for interest and expenses. The execution of the deed by *Parker* was attested by a solicitor of the Supreme Court, and the attestation clause stated that the effect of the deed was, before its execution, explained by him to *Parker*. At the foot of the deed, immediately below the attestation clause, there was the following receipt signed by *Parker*:—

"Received the day and year first within written of and from the within named mortgagees the sum of £90, which sum, together with the agreed sum of £30 for interest and expenses, makes the sum of £120, being the consideration money within expressed to be paid by them to me." The deed was registered. In February, 1880, *Parker* filed a liquidation petition, and on the 6th of April the Registrar, on the application of the trustee, made an order declaring the bill of sale void as against him, on the ground that the consideration for the deed was not set forth in it in compliance with the provisions of sect. 8 of the *Bills of Sale Act*, 1878. The bank appealed.

Guiry, for the Appellants:—

Even without looking at the receipt, the consideration is set forth in the deed so as to satisfy sect. 8. The retention of the £30 by the bank was in pursuance of a collateral bargain as to the application of part of the consideration which it was not necessary to state in the deed: *Ex parte National Mercantile Bank* (1). But, at any rate, the receipt is a part of the deed, and is filed with it, and it fully explains the transaction. It is sufficient that the true consideration should appear from some part of the deed. Indeed, sect. 10 of the Act requires that if a bill of sale is made "subject to any defeasance or condition or declara-

(1) 15 Ch. D. 42.

tion of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith, and as part thereof, otherwise the registration shall be void." The receipt may be considered as a "condition" within that section.

J. F. H. Bethell, for the trustee:—

[JAMES, L.J.:—The only question is whether the deed can be supplemented by the receipt. We think it is clear that if the deed stood alone the consideration would not be set forth as required by sect. 8.]

Sect. 8 means that the true consideration must be set forth in the deed in the ordinary way, and not that it should be spelt out by means of a receipt at the foot or on the back of the deed. The grantees are estopped by the operative part of the deed from saying that the consideration was not to be £120. The transaction was clearly a sham one. The receipt is not part of the deed. The decision of the Chief Judge in *In re Rogers* (June 14, 1880) is an authority that where a part of the expressed consideration was retained for the solicitor's costs of the bill of sale and the charges of an auctioneer for valuing the property comprised in it, the consideration had not been properly stated in the deed.

[*Winslow*, Q.C., *amicus curiæ*, referred to *Jones* v. *Harris* (1); *Ex parte Mackenzie* (2).]

Guiry, in reply:—

A true copy of the bill of sale could not be registered without setting out the receipt.

[JAMES, L.J.:—If the receipt was part of the deed, the attestation ought to have come after it.]

That is a mere matter of form.

JAMES, L.J.:—

I am of opinion that the judgment of the Registrar must be

(1) Law Rep. 7 Q. B. 157. (2) 42 L. J. (Bkcy.) 25.

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affirmed. It is clear that the true consideration is not set forth in the bill of sale. The very object of the Act was to prevent the setting forth as part of the consideration that which was retained by the grantor in the shape of interest and expenses. In *Ex parte National Mercantile Bank* (1) the consideration was stated to be a loan of £2050 by the grantees to the grantor, and it was not the less a loan of that amount because by a collateral agreement £550, part of it, was to be applied in the payment of a real *bonâ fide* debt from the grantor to the grantees existing at the time, and not arising out of the then transaction between the parties. In the present case there was really an evasion of the provisions of the Act, and it is not at all like *Ex parte National Mercantile Bank*.

With regard to the other point, whether we can look at the receipt which is subscribed at the foot of the deed for the purpose of supplementing, or rather of correcting, the statement of the consideration on the face of the deed, it appears to me that, independently of the position of the receipt after the attestation clause, it is impossible to say that the receipt is part of the bill of sale, and the Act says that the bill of sale shall set forth the consideration, otherwise it shall be void as against the trustee in bankruptcy of the grantor. Here the bill of sale does not set forth the consideration. But it is further required by the Act that the execution of the bill of sale "shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor." In the present case the execution is attested by a solicitor who states that before its execution he explained the effect of it to the grantor, and after the attestation there comes something which never has been attested, and as to which there is no statement that it has been explained to the grantor. I am of opinion, therefore, that the receipt cannot be looked at as a statement of the consideration.

COTTON, L.J.:—

The first question is whether the bill of sale really states the consideration, and in my opinion it does not. It states that £120

(1) 15 Ch. D. 42.

was the consideration, whereas in fact only £90 was advanced to the grantor, and the rest of the £120 was retained by the bank for "interest and expenses." The case is not like *Ex parte National Mercantile Bank* (1), for there the retainer was for the purpose of satisfying a debt existing independently of the transaction of loan. In the present case, on the contrary, the whole of the liability for "interest and expenses" arose out of that transaction of loan which the bill of sale completed and rendered effectual. In the other case the debt existed independently, and would have remained if the loan secured by the bill of sale had not been made. I think that this kind of retainer was the very thing aimed at by the Act; the object was to prevent the giving of a security for a sum said to be advanced, when in fact a large part of it was retained by the grantee. Independently, therefore, of the other point, there is an end of the case.

It is said, however, that we ought to look at the receipt, and that if we do so, the real consideration for the bill of sale is stated. But we are bound by the provisions of the Act, and to my mind it is impossible to say that the deed in this case does state the consideration. The receipt is not part of the deed. It is said that it may be used to correct the statement in the deed, but that is not what is required by the Act. I did at one time entertain a doubt by reason of those decisions upon the *Bills of Sale Act*, 1854, to which Mr. *Winslow*, as *amicus curiæ*, has referred us. That Act required that on the registration of a bill of sale there should be filed with it an affidavit giving a description of the residence and occupation of the grantor, and it was held that an insufficient description in the affidavit might be explained by a reference to the description given in the bill of sale itself. But I think that those cases are distinguishable from the present case. In *Jones* v. *Harris* (2) the affidavit, which was made by the attesting witness, stated that the grantor resided at *Dynevor Lodge*, and was an auctioneer. That was held to be an insufficient description. But the bill of sale itself described the grantor as "of *Dynevor Lodge*, in the parish of *Llanarthney*, in the county of *Carmarthen*, auctioneer," and it was held that the copy of the bill of sale which was filed might be referred to, in order to explain

(1) 15 Ch. D. 42. (2) Law Rep. 7 Q. B. 157.

C. A. 1880 — *Ex parte* Charing Cross Advance and Deposit Bank. — *In re* Parker.

and supplement the description given by the affidavit, and that, consequently the Act had been complied with. In *Ex parte Mackenzie* (1) it was held that an insufficient description of the attesting witness to a bill of sale contained in his affidavit filed on the registration of the bill of sale might be cured by reference to a sufficient description of him in the attestation clause of the bill of sale. In the present case it is sought, not to correct an insufficient statement in the bill of sale by reference to another document, but entirely to contradict the statement in the bill of sale. I found my decision on this, that the Act requires that the bill of sale should state the consideration. It does not state it, and we are bound to give effect to the fair construction of the Act.

Lush, L.J.:—

The Act says that the bill of sale shall set forth the consideration for which it was given. The consideration is that which the grantor receives from the grantee for giving the bill of sale, and it means, of course, the true consideration. Now, in that part of the bill of sale in the present case in which the consideration is referred to, it is stated to be £120, whereas the grantor received only £90. No doubt this fact is stated in the receipt, but the Act says that the consideration must be stated in the bill of sale. Is, then, the receipt part of the bill of sale? In the first place, it is not necessary there should be a receipt at all. And, certainly, in the present case, the receipt is not part of the bill of sale, for the Act requires that the execution of the bill of sale should be attested, and the receipt is not attested. Reliance has been placed on the provision of sect. 10, that if a bill of sale is made subject to any defeasance or condition, such defeasance or condition shall be deemed to be part of the bill. That section, however, while it expressly refers to a defeasance or condition, does not refer to a receipt. I think, therefore, that the provisions of the Act have not been complied with.

Solicitor for Appellants: *J. E. Betts.*
Solicitor for Trustee: *C. A. Swaine.*

(1) 42 L. J. (Bkcy). 25.

C. A.
1880
Nov. 5.

In re BIRCHALL.
WILSON *v.* BIRCHALL.

[1878 B. 325.]

Infants—Compromise.

An order having been made approving, on behalf of infant Defendants, a compromise which was objected to by their guardian and opposed by their counsel:—

Held, that the Court had no jurisdiction to enforce a compromise against infants against the opinion of their advisers, and that the order must be discharged.

THOMAS BIRCHALL, by his will, dated in 1875, gave his residuary personal estate to trustees upon trust to convert the same into money and invest the proceeds, and pay an annuity to his wife during her life, and subject thereto stand possessed of the premises for *Thomas W. Birchall* and *Catherine Ann Birchall* in equal shares, with gifts over in the event of their dying in his lifetime or after his decease and under the age of twenty-one years, and he directed an allowance for their maintenance to be paid during their minorities to *Jane A. Hindle*, to be applied by her without her rendering any account; and he appointed his trustees his executors.

The trustees and executors brought their action against the widow, *Thomas W. Birchall* and *Catherine Ann Birchall*, who were both infants, and *Jane A. Hindle*, for the administration of the testator's estate, and the usual decree for administration was made.

Mrs. *Birchall*, on the 22nd of January, 1880, took out a summons asking to have it declared that a large amount of personal property specified in the summons represented a share of the residuary estate of *R. R. Rothwell* bequeathed to her, and had never been reduced into possession by the testator, and that the testator was at his death a trustee thereof for her, and that she was now entitled thereto, and that the estate of the testator was liable to make it good to her.

The summons was adjourned into Court, and on the 14th of

C. A. 1880 *In re* BIRCHALL. WILSON *v.* BIRCHALL.

June, 1880, the Vice-Chancellor *Malins* suggested a compromise that Mrs. *Birchall* should be declared entitled to a certain part of the property she claimed, and should abandon her claim to the residue. Mrs. *Birchall* assented to these terms, and *Jane A. Hindle* did not object, but the counsel for the infants refused to assent, the guardian being opposed to the compromise. The Vice-Chancellor, however, made an order, which, after stating the terms proposed, proceeded: "And the said Defendant *Jane A. Hindle*, by her counsel, having assented to and accepted the said offer, and the counsel for the infant Defendants *T. W. Birchall* and *C. A. Birchall* having refused to accept the said offer, this Court doth order that it be referred to Chambers to inquire whether it will be for the benefit of the infant Defendants that such offer of the said Defendant *Mary Birchall* should be accepted."

On the 28th of June, 1880, the Vice-Chancellor approved of the compromise as beneficial to the infants, and made an order for carrying it into effect.

The infant Defendants appealed from both orders.

Finch, for the appeal:—

The guardian of the infants disapproved of the compromise, and their counsel opposed it, but the Vice-Chancellor considered that he had jurisdiction to approve of a compromise on behalf of infants whether their advisers approved of it or not.

[JESSEL, M.R.:—Neither I nor the Lords Justices, who have had a longer experience than I, ever knew of such a course being taken. If the Court saw that a guardian or next friend was acting improperly and against the infants' interests in refusing to assent to an arrangement which appeared clearly beneficial to them, steps might be taken to remove him and substitute some other person, but I never heard of such a thing as the Court compromising without the consent of the next friend or guardian.

COTTON, L.J.:—This is not approving of a compromise, but compelling one. What jurisdiction has the Court to do so?]

J. Pearson, Q.C., and *Bryce*, for the widow, submitted the question to the Court.

W. Barber, for the trustees and executors.

E. S. Ford, for *Jane A. Hindle.*

JESSEL, M.R.:—

In my opinion the course which has been taken in this case is quite unprecedented. The Court can approve of a compromise on behalf of infants, but it cannot force one upon them against the opinion of their advisers. The practice followed by myself, and by Lord *Romilly* before me, at the Rolls, has been to require not only that the compromise should be assented to by the next friend or guardian of the infant, but that his solicitor should make an affidavit that he believes the compromise to be beneficial to the infant, and that his counsel should give an opinion that he considers it to be so. If the opinion given is only that of the junior counsel and there is a leader, I ask the leader in Court whether he agrees with the junior's opinion, and this was also Lord *Romilly's* practice. This is the first time that I have known a compromise enforced upon infants against the opinion of their guardian or next friend and of their legal advisers, and I am of opinion that the orders cannot be sustained. The Respondent can hardly be considered to be in fault, as she only took what was offered by the Court, and we, therefore, do not order her to pay costs.

JAMES and COTTON, L.JJ., concurred.

Solicitors: *Gregory, Rowcliffes, & Rawle; Ridsdale, Craddock, & Ridsdale.*

M. R.
1880
Feb. 2.

In re PARKER.
BARKER *v.* BARKER.

[1879 P. 379.]

Will—Residuary Gift to Class—Gift at Twenty-one—Interim Discretionary Trust for Maintenance—Interest whether vested or contingent.

A testatrix gave her residuary real and personal estate to trustees in trust for sale and conversion and investment of the proceeds, and to hold the investments upon trust to pay the income thereof, "or such part thereof as her said trustees" should "from time to time deem expedient," in or towards the maintenance and education of her children until they should attain their respective ages of twenty-one years; and from and immediately after their attaining their respective ages of twenty-one years, then upon trust to pay and transfer the capital to her said children in equal shares, and to settle each daughter's "share whether original or accruing"; and the testatrix empowered her trustees to dispose of any competent part, not exceeding one-half, of "the presumptive share of any of her children," for their advancement in life.

The testatrix left three children, of whom two attained twenty-one, and the third died an infant:—

Held, that the infant did not take a vested interest in his one-third share of the residuary estate of the testatrix.

Fox v. *Fox* (1) distinguished.

MARTHA ELIZABETH PARKER, widow, who died in 1863, by her will, dated in 1856, gave her residuary real and personal estate to trustees in trust for sale and conversion, and to invest the proceeds upon the stocks, funds, and securities therein mentioned, and to stand possessed of the said stocks, funds, and securities, "upon trust to pay the dividends, interest, and income thereof, or such part thereof as my said trustees for the time being shall from time to time deem expedient, in and towards the maintenance and education of my children until my said children shall attain their respective ages of 21 years; and from and immediately after their attaining their respective ages of twenty-one years, then upon trust to pay, assign, and transfer the said stocks, funds, and securities to my said children in equal shares, if more than one, and if but one, then to such one child; and as to each daughter's share, whether original or accruing, upon trust to settle

(1) Law Rep. 19 Eq. 286.

the same," for the benefit of herself and her children. And the testatrix declared "that it shall be lawful for the trustees or trustee for the time being of this my will to assign, transfer, or dispose of any competent part, not exceeding one half of the presumptive share of any of my children for the preferment or advancing in life, or preparing for business, or on the marriage of any such child (being daughters) notwithstanding their minorities."

The testatrix had three children, two sons and a daughter, all of whom survived her. One of the sons died in 1873 an infant, leaving his brother and sister, who both attained twenty-one, his next of kin.

The daughter, Mrs. *Barker*, married in 1878, and in pursuance of the direction in the will a settlement was executed of her "moiety" of her mother's residuary estate.

The question was whether Mrs. *Barker's* moiety of surplus income of the infant's one third remaining unapplied by the trustees for his maintenance and education devolved upon her as one of his next of kin, or whether it was bound by her settlement; in other words, whether the infant's share was to be treated as "vested" or "contingent."

Woodroffe, for the Plaintiff, the husband and legal personal representative of Mrs. *Barker*, who had died, contended that the effect of the direction in the will to apply the income for the maintenance of the children until twenty-one, followed by the gift at twenty-one, was to create an immediate vested interest in one-third in each child: *Fox* v. *Fox* (1); and accordingly that the surplus income of the deceased infant child's one third belonged to his next of kin.

S. Roberts, for the Defendants, the trustees of Mrs. *Barker's* settlement, was not called upon.

JESSEL, M.R.:—

It appears to me that this case is different from that of *Fox* v. *Fox*. In my opinion, when a legacy is payable at a certain age,

(1) Law Rep. 19 Eq. 286.

M. R.
1880
In re PARKER.
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but is, in terms, contingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom the legacy is given; and not the less so when there is superadded a direction that the trustees "shall pay the whole or such part of the interest as they shall think fit." But I am not aware of any case where, the gift being of an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in the meantime for their maintenance has been held to create a vested interest in a member of the class who does not attain that age.

The words here are plain. The trust is of residue; "to pay the dividends, interest, or income thereof, or such part thereof as my said trustees for the time being shall from time to time deem expedient, in or towards the maintenance and education of my children, until my said children shall attain their respective ages of twenty-one years;" so that there is nothing here giving an aliquot share of income to any individual child; the direction being to pay the income of the whole fund in such shares as the trustees shall think fit. I do not think you can infer anything from the direction for the settlement of the daughters' shares.

Then follows a gift of the whole fund to the children equally on attaining twenty-one. I should have felt no difficulty if it had not been for the advancement clause, which speaks of the "presumptive share of any of my children," but I do not think that clause is sufficient to alter the effect of the preceding part of the will.

That being so, I hold that the infant did not take a vested interest in his one-third share of the residue, and, accordingly, that Mrs. *Barker's* moiety of the unapplied income of that share is bound by the trusts of her settlement.

Solicitors: *Robinson, Preston, & Stow.*

In re BUNN.
ISAACSON *v.* WEBSTER.

[1880 B. 172.]

M. R.
1880
Nov. 25.

Will—Residuary Gift to Individual—Gift at Thirty—Interim Trust for Maintenance—Interest whether vested or contingent.

A testator bequeathed his residuary personal estate to trustees in trust for conversion and investment, and to pay the income to *B.* for his maintenance and until he should attain the age of thirty; and upon his attaining that age to pay or transfer the capital to him absolutely. *B.* survived the testator and died under thirty:—

Held, that *B.* took a vested interest.

JOHN CHARLES BUNN, who died in 1876, by his will, dated in 1873, bequeathed his residuary personal estate to his trustees and executors, in trust for conversion; and by a codicil dated in 1874, he declared that his trustees should hold his residuary personal estate upon trust to invest the same as therein mentioned, "and pay the annual income arising therefrom unto my nephew, *Enoch Bunn*, for his maintenance and until he shall attain the age of thirty years; and, upon his attaining that age, shall pay over or transfer the said trust moneys and securities to the said *Enoch Bunn* for his absolute use and benefit."

The trustees paid the income of the testator's residuary estate to *Enoch Bunn* until his death in 1878, he being then in his twenty-second year.

The question in the action—which was for the administration of the testator's estate—was whether *Enoch Bunn* took a vested interest in the residue, or whether it went to the testator's next of kin.

Bagshawe, Q.C., and *Warlters Horne*, for the Plaintiffs, the trustees of the will, submitted that *Enoch Bunn* took a vested interest, and cited *Batsford* v. *Kebbell* (1); *Pulsford* v. *Hunter* (2); *In re Ashmore's Trusts* (3); *In re Hart's Trusts* (4); *Fox* v. *Fox* (5).

(1) 3 Ves. 363.
(2) 3 Bro. C. C. 416.
(3) Law Rep. 9 Eq. 99.
(4) 3 De G. & J. 195.
(5) Law Rep. 19 Eq. 286.

M. R. 1880 *In re* BUNN. ISAACSON *v.* WEBSTER.

Roxburgh, Q.C., and *Romer*, for the Defendants, the next of kin, *contrà*, cited *In re Parker* (1), and *Spencer* v. *Wilson* (2).

JESSEL, M.R.:—

It appears to me that I am bound by the decision of the Court of Appeal in *In re Hart's Trusts* (3).

With reference to the case of *In re Parker*, it is the same as to this point as *Leake* v. *Robinson* (4). I do not wish to express any opinion of my own as to the effect of a gift coupled with a direction of this kind, because I consider I am bound by decision. The authorities are all collected in Mr. *Theobald's* book on Wills (5). He says, as the result of them, that a gift contingent upon attaining a given age may be vested "if the interest upon the legacy is given to the legatee in the meantime till the time of payment arrives." Then he says this is the case "though the interest may be expressed to be given for maintenance." That is *In re Hart's Trusts*, which covers this case completely: I cannot see any distinction. There the testator directed his trustees to pay £500 to his daughter when she should attain twenty-five, and that the legacy should carry interest to be paid towards her maintenance until she attained twenty-five. The daughter died under twenty-five, yet it was held that she took a vested interest in the legacy.

Then I notice that Mr. *Theobald* says—and it is quite right—"It makes no difference, whether the interest is first given up to a given time and then the principal, or *vice versâ*, at any rate, if the age fixed is either twenty-one or some later age, but such as to indicate that the testator has fixed upon it only from the probable incapacity of the legatees to manage their property satisfactorily earlier:" and as authority for that proposition he refers to five cases.

In the present case there is a direction to pay the income of the residue to the legatee for his maintenance until he attains the age of thirty; and, upon his attaining that age, to pay or transfer the capital to him. Whatever may be said about *Batsford* v.

(1) *Ante*, p. 44.
(2) Law Rep. 16 Eq. 501.
(3) 3 De G. & J. 195.
(4) 2 Mer. 363.
(5) Page 276.

Kebbell (1), I am of opinion that I am clearly bound by *In re Hart's Trusts* (2) to hold that this is sufficient to give a vested interest.

I therefore declare that the residuary estate became vested in *Enoch Bunn*.

Solicitors: *Waddilove & Nutt*, agents for *J. Button, Newmarket.*

In re COPE.

COPE *v.* COPE.

[1880 C. 0430.]

Administrator durante minore ætate—Power to sell.

An administrator *durante minore ætate* has, for the time, all the powers of an ordinary administrator, including a power to sell the estate of the deceased for payment of debts.

GODFREY LOUIS COPE, being entitled, subject to certain annuities, to a share in the residuary estate of a testator, *William Spark*, deceased, died in 1875, intestate, leaving a widow, also three children, two sons and a daughter, the infant Plaintiffs.

In 1876 letters of administration to *G. L. Cope's* estate were, upon the renunciation of his widow, granted to the Defendant, *Frederick Charles Cope*, the grandfather and the curator or guardian duly elected by the Plaintiff, the daughter, for her use and benefit, and also for the use and benefit of the Plaintiffs, the two sons, and until one of them should attain the age of twenty-one years.

G. L. Cope had in his lifetime executed mortgages of his share in *William Spark's* residuary estate, which constituted, substantially, his, *G. L. Cope's*, entire property. After *G. L. Cope's* death the Defendant, *F. C. Cope*, as such administrator as aforesaid, mortgaged the share to the Defendants, the *Equitable Reversionary Interest Society*, who took a transfer of the subsisting securities, and shortly afterwards he sold and assigned the equity of redemption to the society.

(1) 3 Ves. 363. (2) 3 De G. & J. 195.

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The Plaintiffs alleged in their statement of claim that the mortgage and assignment by *F. C. Cope* were not executed by him in the interest or for the benefit of the Plaintiffs, but, on the contrary, were executed to their prejudice: that all the moneys received by him were applied for his private purposes: that the testator, *William Spark*, died possessed of very large real and personal estate: and that under divers orders made in a suit for the administration of *William Spark's* estate, sums of money very largely in excess of the mortgages by *G. L. Cope* had been paid to the Defendant society. The Plaintiffs claimed, in effect, to have it declared that the mortgage and sale by the Defendant *F. C. Cope* were void, and that all moneys received by the Defendant society thereunder, with interest, formed part of *G. L. Cope's* estate; and administration of that estate.

The Defendant society demurred to the statement of claim for want of equity, thus raising the question, whether an administrator *durante minore ætate* has power to sell and dispose of the estate of the deceased.

Chitty, Q.C., and *B. B. Rogers*, for the demurrer:—

According to all the more modern authorities an administrator *durante minore ætate* has, for the time being, all the power and authority of an absolute administrator: *Com.* Dig. "Administration," (F.); *Roll.* Abr. "Executors," (M.) (1); *Lawson* v. *Crofts* (2); *Fotherby* v. *Pate* (3); *Monsell* v. *Armstrong* (4). All the authorities admit that an ordinary administrator can sell for payment of debts; and if so, the purchaser is not bound to see to the application of the purchase-money: administration would otherwise be impossible. The authorities which say that an administrator *durante minore ætate* cannot sell, mean only that, as between himself and the estate, he ought not to sell: *Shep.* Touch. (5). Here the statement of claim admits that all *G. L. Cope's* property was comprised in the mortgages, and that interest was payable on the mortgages made by him: consequently it is an admission that there were debts of *G. L. Cope* for which the administrator was bound to find money, which he could not do

(1) 1 & 2.
(2) 1 Sid. 57.
(3) 3 Atk. 603.
(4) Law Rep. 14 Eq. 423.
(5) Preston's Ed. (1821), vol. ii. p. 490.

without dealing with, either by mortgaging or selling, the property comprised in the mortgages.

We admit that there are *dicta* in some of the books which apparently restrict the power of an administrator *durante minore ætate* to sell his testator's goods; but these are all traceable to certain *dicta* in *Prince's Case*, or *Price* v. *Simpson* (1): where a sale of a leasehold by the administrator was held to be bad. That case was subsequently distinguished in *Sir Moyle Finch's Case* (2), on the ground that it turned on the special and restricted terms of the grant of administration. When *Prince's Case* was decided it was doubtful whether an administrator *durante minore ætate* had a property in the goods; the older notion being that he was a mere bailiff or curator: *Bac.* Abr. "Executor," (B.) (3); but it was decided in *Pasch.* 42 Eliz., in *Sethe* v. *Sethe*, which was later than *Prince's Case*, that he had more than a custody of the goods—that he had a property in them: *Roll.* Abr. "Executor," (M.) (4). It is true that there have been some instances in which this position has apparently been receded from, as in *Thackston* v. *Hunlocke* (5), where a release of a debt by such an administrator was held void, on the ground that he had a bare authority and not the property: but, on the whole, it seems to be now settled that he has the property: *Williams* on Executors (6). If he has not, who has? Any possible distinction between an administrator *durante minore ætate* of an executor and an administrator *durante minore ætate* of the next of kin, is now removed by the statute 38 Geo. 3, c. 87, which says (ss. 6, 7) that an administrator *durante minore ætate* of an executor shall have the same powers as belong to an administrator *durante minore ætate* of the next of kin.

In answer to *Prince's Case* (7), which is the only authority adverse to our contention, we say, 1, that the matter there in question was a lease, and it was only in more recent times that the complete power of an executor or administrator to make a title to leaseholds was admitted to its full extent: *Sabin* v. *Heape* (8); 2, that it was not then settled that an administrator *durante minore*

(1) 5 Rep. 29 b; Cro. Eliz. 718; 2 And. 132.
(2) 6 Rep. 67 b.
(3) 1 & 2.
(4) Pl. 2.
(5) 2 Keb. 11, 30.
(6) 8th Ed. p. 496.
(7) 5 Rep. 29 b; Cro. Eliz. 718; 2 And. 132.
(8) 27 Beav. 553.

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ætate had a property in leaseholds; 3, that that was the case of an *executor*, and until the passing of the above-mentioned Act of 38 Geo. 3, c. 87, the position of an administrator *durante minore ætate* differed according as there was an executor or no executor; 4, that the distinction there made between *bona peritura* and other goods cannot now be maintained.

If the demurrer is overruled, it will become impossible to wind up the estate of a deceased person who leaves infants.

[They also referred to *Attorney-General* v. *Köhler* (1).]

T. L. Wilkinson, for the Plaintiffs, relied on *Prince's Case* (2), and contended that an administrator *durante minore ætate* had only a limited and special property in the estate of the deceased, and had no general power of disposition.

JESSEL, M.R.:—

The question in this case is raised by reason of some obscure *dicta* in some musty old law books about the power of an administrator *durante minore ætate*. The limit to his administration is no doubt the minority of the person, but there is no other limit. He is an ordinary administrator: he is appointed for the very purpose of getting in the estate, paying the debts, and selling the estate in the usual way; and the property vests in him. I am of opinion that he clearly can sell for the purpose of paying the debts. In this case there is no doubt of there being debts, and there is no allegation that he sold for any other purposes.

Then it is said that the sale is not beneficial. That may be. It sometimes is not beneficial for a man to pay his debts.

Then again it is said that the administrator applied the money to his own use. I am afraid that not only administrators but other trustees do that sometimes; but that does not affect the sale.

In my opinion there is no sufficient ground to support this statement of claim, and I therefore allow the demurrer.

Solicitor for Plaintiffs: *G. R. Pilgrim.*

Solicitors for Defendant: *Clayton, Sons, & Fargus.*

(1) 9 H. L. C. 655. 8 Jur. N.S. 467 (2) 5 Rep. 29 b; Cro. Eliz. 718; 2 And. 132.

UNION BANK OF LONDON *v.* INGRAM.

M. R.
1880
Nov. 13.

[1876 U. 8.]

Mortgage — Proviso for Reduction of Interest — Mortgagee in Possession — Accounts—Right to Higher Rate of Interest.

Under a proviso in a mortgage deed for reduction of interest on punctual payment, a mortgagee in possession through the default of the mortgagor is entitled, on the accounts being taken, to charge the mortgagor with the higher rate of interest; and also, in a proper case, with the commission paid to a receiver for collecting the rents.

Stains v. *Banks* (1) considered.

ISCD 453.

ADJOURNED SUMMONS.

In this action—which was a redemption action by the *Union Bank of London*, the second mortgagees of certain leasehold houses at *Kensington*—a judgment order had been made, on the 10th of May, 1879, referring the accounts and inquiries to the official referee, who was to be at liberty to refer back any question to the Judge.

By the first mortgage, which was dated the 28th of February, 1861, and made between *Hall*, the mortgagor, of the one part, and *Stephens* and *Ingram*, the mortgagees, of the other part, the houses were assigned to *Stephens* and *Ingram* by way of mortgage for securing the repayment to them of £6000 with interest thereon at the rate of 6 per cent. per annum. The mortgage contained a covenant by the mortgagor with the mortgagee for payment of interest at the rate of 6 per cent. per annum, and the following proviso: "Provided also, and it is hereby further agreed and declared that if the said *James Hall*, his executors, administrators, or assigns, shall, on every 20th day of April and 20th day of October, so long as the said principal sum of £6000, or any part thereof, shall remain unpaid, or within forty days after each of the said days respectively, pay the said *G. Stephens* and *J. A. Ingram*, or the survivor of them, his executors or administrators, or their or his assigns, interest for the said sum of £6000, or for so much thereof as shall for the time being remain unpaid, after the rate of 5 per cent. per

(1) 9 Jur. (N.S.) 1049; reversed on appeal, Reg. Lib. 7 B. 1863, 1761.

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annum, then and in every such case, but not otherwise, they the said *G. Stephens* and *J. A. Ingram*, or the survivor of them, his executors or administrators, or their or his assigns, shall accept interest at such reduced rate of 5 per cent. per annum for the said sum of £6000, or for so much thereof as shall for the time being remain unpaid, in lieu and satisfaction of the interest at 6 per cent. per annum hereinbefore reserved, for every half year for which such reduced rate of interest shall be paid to them or him within the forty days aforesaid."

The mortgage also contained a power for the mortgagees to appoint a receiver of the rents and profits and to pay him thereout a salary and allowance not exceeding 5 per cent. on the gross rental of the property.

Hall, the mortgagor, who was in embarrassed circumstances at the date of the mortgage, made default in payment of his principal and interest, having, in fact, never paid any interest at all, whereupon the mortgagees, *Stephens* and *Ingram*, took possession of the property and appointed a receiver to collect the rents.

The accounts directed by the judgment order having been taken before the official referee, he found a very large sum to be due on the first mortgage for principal and arrears of interest. In these accounts the interest on the £6000 mortgage debt was charged at the higher rate of 6 per cent. per annum; but to this the Plaintiffs, as second mortgagees, objected, on the ground that under the proviso for reduction of interest, the rate should be 5 per cent. only. The first mortgagees, on the other hand, contended that the proviso in question did not apply, as the interest was obtained or realized by their entering into possession and not by direct payments to them from the mortgagor or his representatives.

The official referee having, in a preliminary report, submitted the question as to the rate of interest chargeable under the mortgage deed of 1861, for the opinion of the Court, the Plaintiffs took out this summons to have the question decided.

Bagshawe, Q.C., and *Methold*, for the Plaintiffs, the second mortgagees:—

We submit that interest should be calculated at the lower and

not the higher rate: *Stains* v. *Banks* (1). The receipt of rents by the mortgagee in possession should be treated as equivalent to payment of interest as it becomes due.

His Lordship observed that he was counsel in *Stains* v. *Banks*, and that to the best of his recollection the decision was appealed. The Registrar's book having been sent for, it was found that the decision was reversed by the Court of Appeal: Reg. Lib. 7 B. 1863, 1761.

Davey, Q.C., and *E. T. Holland*, for the first mortgagees, were not called upon.

Millar, Q.C., and *Everitt*, *Ince*, Q.C., and *G. S. Fryer*, for other parties.

JESSEL, M.R.:—

The question I have to decide is whether, when a mortgagee takes possession of the mortgaged property, default having been made by the mortgagor, and receives rents to an amount exceeding the amount of interest payable by the mortgagor, and receives those rents on or before the day fixed for payment of interest, and accounts are taken against the mortgagee under which a large sum is found due to him for principal and interest, the mortgagor can, under a proviso in the mortgage deed for reduction of interest on punctual payment, compel the mortgagee to accept the reduced rate of interest.

In the present case there is, first of all, an absolute covenant by the mortgagor to pay interest at six per cent. Then there is a proviso that if the mortgagor shall on each of the days fixed for payment of interest at six per cent. per annum, or within forty days thereafter, pay to the mortgagees interest at five per cent. per annum, "then and in every such case, but not otherwise," the mortgagees "shall accept interest at such reduced rate of five per cent per annum . . . in lieu and satisfaction of the interest at six per cent. per annum."

Now it is quite plain that the words of this proviso do not apply to the present case, for the mortgagor never paid any interest at

(1) 9 Jur. (N.S.) 1049.

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all: but it is insisted that under some supposed doctrine of Equity the mortgagor has some right to alter the terms of the contract; for it is said that, the rents having been received by the mortgagee, they become appropriated to payment of interest. But when you come to examine the mode in which the account against a mortgagee in possession is taken the answer is very simple.

In taking the account you take all the mortgagee's receipts and place them on the one side of the account: that is to say, you take all his receipts, whether they arise from the rents, or whether they arise from accidental payments, so to speak, such as fines or heriots: whatever the mortgagee has received from the mortgaged property is charged against him. Then, on the other side of the account you give him credit for his principal and all his interest. The result is that if the rents are more than the interest he keeps the rents without paying interest on the excess: if less, the mortgagor does not pay interest on the unpaid balance of interest. It is an accident in whose favour the account so taken may happen to be, but this is the mode of taking the account. Therefore it is not true to say that the rents are appropriated for the interest, for all the rents and receipts go in reduction of the principal and interest.

In addition to this, it is neither a bargain in words nor a bargain in fact that the mortgagee shall, if he takes possession, be content to accept the lower rate of interest. What the mortgagee says is this: "If you pay me my interest a few days after it becomes due, I will take a less sum in satisfaction of it; but if you drive me into possession and thereby place me in a position of serious responsibility, I shall expect something more."

It is very true that a mortgagee in possession does labour not only under grave responsibility, but several disadvantages. He cannot, in general, look after the property himself, but is obliged to employ an agent to do so, and then he is liable for the acts of his agent: that is one disadvantage. In the next place there is a great deal of trouble to be incurred in collecting the rents. It is not a matter of course that a mortgagee can pay an agent to collect the rents for him, though some of the Judges in modern times have been inclined to shew great leniency in this respect.

A mortgagee, especially if he is a gentleman of position, cannot

be expected to be running about after his rents: he must necessarily employ some one to collect them for him, but he will not in all cases be allowed a commission to his agent: so that here is trouble for which he may get no return. There are certainly allowances made him for repairs and other outgoings in respect of which he has to incur expense; but then he has to keep all his vouchers, and must be prepared to justify every item of his expenditure.

So that the position of a mortgagee in possession is by no means the same thing as that of a mortgagee out of possession, and it would, in my opinion, be a most unjust doctrine to hold that the fact of a mortgagee taking possession altered the bargain between himself and his mortgagor.

Then I am referred to the case of *Stains* v. *Banks* (1), which I should have felt great trouble in dealing with had I not been counsel in the case, and so recollected it; for there Vice-Chancellor *Stuart* decided two things; first, that a mortgagee who took possession of two farms comprised in separate mortgages was in the same position as if he had been paid his interest on the day fixed, and was therefore not entitled to charge the higher rate of interest; and in the next place, because the mortgagee did not collect the rents himself, but employed an agent to do so at a commission, the Vice-Chancellor held that the mortgagee was not justified in employing an agent, and accordingly disallowed the commission. I happened to recollect that that decision was appealed from, and accordingly I sent for the Registrar's book, when I found that the decision was reversed, and that the mortgagee was allowed a higher rate of interest and the whole of his claim for commission paid to his receiver.

That being so, it appears to me, both on principle and authority, that these first mortgagees should, in taking the accounts, be allowed the higher rate of interest, and I so decide.

Solicitors: *Bolton & Co.; Crowder, Anstie, & Vizard,* agents for *Chapman & Ponting, Warminster; W. & J. Flower & Nussey; Deane, Chubb, & Co.*

(1) 9 Jur. (N.S.) 1049.

V.-C. M.
1880
Nov. 6.

In re ALEXANDRA PALACE COMPANY.

Practice — Winding-up — Action — Interrogatories — Corporation — Rules of Court, 1875, *Order* XXXI., *rr.* 1, 4.

The liquidator of a company is entitled to deliver interrogatories to a person claiming to prove who has made an affidavit of documents.

THE *London Financial Association* had carried in a claim for a large sum against the *Alexandra Palace Company*, which was in course of winding up. The secretary of the association had made an affidavit of documents, and the liquidator of the company applied by summons for leave to deliver interrogatories in writing for the examination of the secretary of the association. The summons was adjourned into Court.

Higgins, Q.C., and *Speed*, in support of the summons:—

Under Rules of Court, 1875, Order XXXI., rule 1, we have a right to deliver these interrogatories which the secretary may refuse to answer if they are improper: *Berkeley* v. *Standard Discount Company* (1); *Saunders* v. *Jones* (2).

Everitt, for the association:—

No doubt if this was an action the order would be of course; but the *Judicature Act* does not apply to a winding-up, and a case must be made for such an application, on which the Court will exercise its discretion. A very sufficient discovery of documents has been made, and it would be wrong to allow expense to be incurred by such unnecessary proceedings. This, in fact, is cross-examination on the affidavit of documents, which is not allowed.

MALINS, V.C.:—

I cannot see that the point admits of discussion. The *Alexandra Palace Company* is being wound up, and it is my duty to ascertain what property it has, and what debts it is liable to, and to apply the assets in payment of the debts. The association makes a very

(1) 9 Ch. D. 643. (2) 7 Ch. D. 435.

large claim against the company, and if the company was not in liquidation the claim would be the subject of an action. This order would then be made as of course under Rules of Court, 1875, Order XXXI., rules 1, 4, and there is, in my opinion, no difference in this respect between an action, and a claim in a winding-up. The old practice was to make an officer of a corporation a party, in order to obtain discovery, but this was very inconvenient, and it is now provided that any member or officer of a corporation may be interrogated. The association has selected the secretary, and I think, as I did in *Berkeley* v. *Standard Discount Company* (1), that he has been properly selected. The official liquidator has a right to what he demands, and the association, which has resisted his demand, must pay all the costs except those before the Chief Clerk in the first instan ce.

Solicitors for the Company: *Dawes & Sons.*
Solicitors for the Association: *Harrison, Beal, & Harrison.*

SHEEHAN *v.* GREAT EASTERN RAILWAY COMPANY.

[1878 S. 259.]

Practice—Objection for want of Parties—Rules of Court, 1875, *Order* XVI., *rr.* 13, 14, 17—*Co-owners of a Patent—Right of one Co-owner to sue.*

One of several co-owners of a patent has a right to sue alone for the recovery of profits due for the use of the patent.

An objection by a defendant that other persons should have been joined as plaintiffs should be made promptly, under Rules of Court, 1875, Order XVI., rules 13 and 14, and may not be postponed till the hearing where no impediment exists to raising the objection at once.

THE Plaintiff brought this action against the *Great Eastern Railway Company* for an account of profits made by them, and for royalties alleged to be due from them for the use of a patent taken out by the Plaintiff in the year 1873 for steelifying iron, or converting iron into steel. The claim alleged that an agreement was entered into between the Plaintiff and Defendants, by which the Plaintiff permitted the Defendants to use the invention

(1) 9 Ch. D. 643.

V.-C. M. 1880 SHEEHAN v. GREAT EASTERN RAILWAY CO.

without payment, and to make and use such a quantity of iron to convert into steel, in the construction of engines and other articles, as would enable them to test the value of the invention; and the Defendants agreed, if the trials were satisfactory, that they would take out a license from the Plaintiff to use the invention upon such terms as to payment of royalties and otherwise as should thereafter be agreed upon. The Plaintiff alleged that the trials made by the Defendants turned out to be satisfactory, and that they had continued to use the Plaintiff's invention in the manufacture of their engines, but that they had refused to make any remuneration to the Plaintiff by way of royalties or otherwise for such use thereof.

The claim further stated that by an agreement dated the 3rd of November, 1875, made between the Plaintiff of the one part, and *James, Patrick,* and *George Edwards* of the other part, the Plaintiff had agreed to assign a share of the patent to the other parties to the agreement upon certain terms therein specified, and by two subsequent agreements, dated the 5th of January, 1876, and the 24th of September, 1877, the Plaintiff had parted with a further share in the patent to *George Turner* and *George Wells,* but he alleged that the first agreement of November, 1875, was not valid or binding upon him, and that he intended to take proceedings for the purpose of setting aside such contract.

The defence set up was that the Plaintiff had given the Defendants liberty to use the invention without payment; that the expense of the machinery for working the patent had been so heavy, that very small profit, if any, had resulted from the using of the invention; and that the Defendants had substantially given up using the Plaintiff's invention in March, 1875, and had not used it from that period to the present time.

Higgins, Q.C., and *MacSwinney,* for the Plaintiff.

Glasse, Q.C., *Arthur Charles,* Q.C., and *Smart,* for the Defendants, raised a preliminary objection for want of parties:—

The Plaintiff is not the sole owner of the patent, and as one of several co-owners, he has no right to sue for an account of profits. It is stated in the claim that the Plaintiff has parted with shares

in the patent to several persons, and the utmost claim that he has amounts to no more than one-sixth of the patent, the other five-sixths having been parted with. If he now succeeds in obtaining any royalties for the use of his invention, they will not belong to him, but to others as well, who will also be obliged to take proceedings to recover the amount of the shares due to them, and if the Plaintiff should not succeed in getting a decree, then the owners of the other five-sixths will be able to proceed against us. We are therefore liable to be harassed by other persons who are not before the Court. We say that the action is not properly constituted, and that all the persons interested in the patent ought to be made parties. The claim made by the Plaintiff is for payment of so much of the amount of royalties as, under the circumstances, he may be entitled to; this will raise a question as to the rights existing between the Plaintiff and the other persons entitled to share in the profits of the patent, and we ought not to be exposed to such a litigation when the parties entitled are not present.

Higgins, Q.C., and *MacSwinney*, for the Plaintiff :—

There are three conclusive answers to the objection now raised—

First, under Rules of Court, 1875, Order XVI., rules 13 and 14, this objection ought to have been brought at the earliest time possible, and the Defendants might have moved at any period of the litigation to remove an objection for want of parties; and by the 17th rule of Order XVI. any difficulty is obviated by the Court having power to make such order as may be proper for determining questions not only between the plaintiff and defendant, but between the plaintiff and other persons who may claim contribution or indemnity in respect of the subject-matter of the action. The decision in the case of *Hunter* v. *Young* (1) shews that an important change has been made in the practice of the Court of Chancery, and that an action is not at the present time to be considered defective for want of parties on the ground of other parties interested not being joined. The case of *Clegg* v. *Rowland* (2), decided by your Lordship, was there referred to with

(1) 4 Ex. D. 256.

(2) Law Rep. 3 Eq. 368.

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approbation. *Vallance* v. *Birmingham and Midland Land and Investment Corporation* (1) was decided upon the same principle.

The second answer to the objection is that any co-owner of a patent has a right to sue for profits of a patent without making his co-owners parties to the action. This principle is laid down in Mr. Justice *Lindley's* book on Partnership (2), and it is established in the case of *Dent* v. *Turpin* (3).

Our third answer is that the Plaintiff had not assigned any portion of the interest in his patent till after the acts complained of on the part of the Defendants had been committed. The patent was taken out in 1873. The Plaintiff first agreed to assign part of the profits of his patent in November, 1875, and the Defendants themselves allege that they ceased to make use of the patent in March, 1875. Therefore these profits were made by the Defendants before the assignments by the Plaintiff to the persons who are alleged to be necessary parties.

Arthur Charles, in reply.

MALINS, V.C.:—

This is an action by the Plaintiff against the railway company for an account of royalties to which he alleges he is entitled for the use of a patent he has taken out for a new process for converting iron into steel, or, as it is called, steelifying iron. The claim alleges that the Plaintiff still has a material interest in the patent. It appears that the patent is dated in October, 1873, and in the years 1875 and 1876 he transferred some interest in the patent to three persons, but they are not made parties to the action. The Defendants take this objection, that the Plaintiff cannot sue alone —that he ought to have made his co-owners parties to the action, and they therefore object to the action proceeding in its present form. There are three defences to this objection. I will take the second first, which is, that one of several owners of a patent is at liberty to sue alone, and if that is a valid answer, then the other two defences will be needless. My opinion is that one person interested in a patent is entitled to sue, without making his co-

(1) 2 Ch. D. 369. (2) Vol. i. p. 68.
(3) 2 J. & H. 139.

owners parties to the action, either for an injunction or for an account. I might put a case of this kind: Suppose a person is entitled to an estate jointly with others, and a wrongdoer insists upon cutting down timber upon the estate, what is there to prevent one owner from suing without his co-owners being parties to the action? He certainly would be entitled to sue to prevent the wrong being done. It is in principle the same case. Then as to authority, we have a passage from Mr. Justice *Lindley's* book on Partnership (1), where he says "cases may nevertheless arise in which justice may be done by allowing each co-owner [of a chattel] to make what he can and to keep what he may get. This may occur where the chattel is such that each co-owner can, in fact, enjoy his rights to the full extent without the concurrence of the other owners (*e.g.*, where the chattel is a patent for an invention). In the case of a patent belonging to several persons in common each co-owner can assign his share and sue for an infringement." That is very distinct, but there is a still stronger authority in the case of *Dent* v. *Turpin* (2). There the plaintiff and another person carried on distinct trades at different places of business, both having derived from a common predecessor the right to use the name of *Dent* as a trade-mark. The defendant infringed the right of the plaintiff, and it was held on demurrer that the plaintiff, without averring special damage, might sue alone for an injunction, and for the delivery up of the articles to have the name erased; and it was further held that he might sue alone for an account of profits made by the defendant out of the articles so marked, and for payment to the plaintiff of such part of such profits as the plaintiff should be entitled to.

Therefore, both on principle and on authority, I am justified in saying that the Plaintiff is entitled to sue alone. But there is another point raised under the *Judicature Act*, which is, that this objection as to parties should have been taken at an earlier period. The objection is set up by the defence, and the Plaintiff might, if he had been so advised, have amended his claim by adding his co-owners as defendants, for he could not have made them co-plaintiffs without their express sanction. Now the objec-

(1) 4th Ed. vol. i. pp. 68, 69. (2) 2 J. & H. 139.

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tion is raised under Order XVI., rules 13 and 14, which proceed on these grounds. It was always felt to be a hardship on the plaintiff that he should be allowed to bring his suit to a hearing and then be met by an objection for want of parties, and therefore it is provided by the 13th rule that the Court may at any stage of the proceedings order that the name or names of any party or parties, whether as plaintiffs or defendants, improperly joined be struck out, and that the name or names of any parties, whether plaintiffs or defendants, who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added. Then the 14th rule directs that "any application to add or strike out or substitute a plaintiff or defendant may be made to the Court or a Judge at any time before trial by motion or summons, or at the trial of the action in a summary manner."

What difficulty was there in raising this objection at an earlier period? It was an objection that used to be raised by demurrer; but the defendant is armed by the *Judicature Act* with power to apply to the Court by motion at any time, that the plaintiff be ordered to make other persons parties to the action, and the Court has competent power to make such an order, and justice is done by settling the question of necessary parties at the earliest opportunity, without waiting for the plaintiff to incur all the expense of bringing the action to a hearing. I see no excuse in this case for the Defendants having neglected to take this objection at the proper time.

Then there is a third fatal objection raised by the Plaintiff, namely, that according to the statement in this claim the Defendants entered into the agreement to use the patents in the year 1873, and it is alleged by them that they never made use of the patent after March, 1875. Now, it was not till after that period that these persons who it is alleged ought to have been parties acquired any interest in the Plaintiff's patent.

On all these grounds the objection is wholly unsustainable.

I wish it to be distinctly understood that my opinion is that one of several co-owners of a patent of this sort is entitled to sue by himself alone.

As regards the decision I have arrived at, that the objection should have been taken at an earlier period, I find the same principle acted upon in *Hunter* v. *Young* (1) and *Vallance* v. *Birmingham and Midland Land and Investment Corporation* (2).

The hearing of the case was then proceeded with, but before the evidence of the first witness was concluded a compromise was effected between the parties on payment by the Defendants to the Plaintiff of a sum of £300, each party paying his own costs.

Solicitors for Plaintiff: *Ley & Brocklesby.*
Solicitor for Defendants: *C. A. Curwood.*

(1) 4 Ex. D. 256. (2) 2 Ch. D. 369.

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1880
July 21;
Aug. 7.

HARRISON *v.* CORNWALL MINERALS RAILWAY COMPANY.

[1880 H. 24.]

Railway Company — Mortgages and Debenture Bonds — Debenture Stock — Priorities—Lands Clauses Consolidation Act, 1845, *Companies Clauses Act*, 1863, *Part III.—Cornwall Minerals Railway Companies Acts*, 1873, 1875, *and* 1877—*Practice—Rules of Court*, 1875, *Order* XXXIV, *r.* 1, *Special Case under.*

By the *Cornwall Minerals Railway Act*, 1873, the company were empowered to borrow on mortgage to the extent of £250,000, and to issue debenture stock subject to the provisions of Part III. of the *Companies Clauses Act*, 1863, "but notwithstanding anything therein contained" the interest of all debenture stock "at any time created by the company" was to rank *pari passu* with the interest of all mortgages "at any time granted" by the company, and should have priority over all principal moneys secured by such mortgages.

By a later Act of 1875 the company were empowered to raise additional capital, and in respect thereof to borrow a further sum on mortgage, and after providing that the principal secured by all mortgages granted by the company before the passing of that Act should have priority over the principal secured by all mortgages granted under that Act, the company were empowered to issue debenture stock subject to the provisions of the Act of 1863, but the interest of all debenture stock created and issued at any time after the passing of that Act was to rank *pari passu* with the interest of all mortgages at any time after the passing of that Act granted by the company, and should have priority over all principal moneys secured by such mortgages.

By another Act of 1877 power to raise a further sum by the issue of debenture stock under provisions similar to those in the Act of 1875 was given to the company.

The revenues of the company being insufficient to pay in full the interest on the mortgages and debenture stock granted and issued by the company under these powers, a receiver of the undertaking was appointed by the Court; and upon a special case stated under Rules of Court, 1875, Order XXXIV., rule 1, in an action brought for the purpose, it was held—

First, that, notwithstanding the words "at any time" in the Act of 1873, the enactment therein contained applied only to the mortgage debt and debenture stock for which provision was made by the Act; and consequently that the interest on the subsisting mortgages granted and debenture stock issued under the Act of 1873, had priority over the interest of all debenture stock created under the subsequent Acts of 1875 and 1877, and that such interest was payable *pari passu* to the mortgagees and holders of debenture stock having such priority.

Secondly, that the enactments of the Act of 1875 operated as to debenture

stock created and issued after the passing of that Act under the powers of the Act of 1873, as well as to that created and issued under the Act of 1875, but had no operation as to debenture stock created and issued under the Act of 1877.

Thirdly, that the principal of the mortgages for the time being due would by means of the appointment of a receiver under a section in that behalf of the Act of 1873, contained have priority of payment next after the interest having priority as aforesaid; and

Fourthly, that the holders of mortgages of the company which had not yet become due were not entitled to any lien in respect of their principal on the moneys in the hands of the receiver.

Where a special case for the opinion of the Court is stated in an action pursuant to the Rules of Court, 1875, Order XXXIV., rule 1, and the answers to the special case in fact dispose of the action, the proper course is to take the answers in the shape of a judgment making declarations to the effect of the answers, the action being, if necessary, set down *pro formâ* for trial on motion for judgment.

Varied in appl. 15 Ch. D. 364 C.A.

SPECIAL CASE stated in an action.

The *Cornwall Minerals Railway Company* was incorporated by the *Cornwall Minerals Railway Act*, 1873, and its affairs are governed by that Act and by two subsequent Acts of 1875 and 1877. By the first-mentioned Act, the *Companies Clauses Consolidation Act*, 1845, and Part III. of the *Companies Clauses Act*, 1863 (relating to debenture stock), were, amongst other Acts, and except where expressly varied, incorporated therewith, and the company were empowered from time to time to borrow on mortgage any sum not exceeding £250,000.

The *Companies Clauses Consolidation Act*, 1863 (26 & 27 Vict. c. 118), provides in Part III., s. 24, that the interest on debenture stock shall "rank next to the interest payable on the mortgages or bonds for the time being of the company legally granted before the creation of such stock; but the holders of debenture stock shall not as among themselves be entitled to any preference or priority."

The 30th section of the same Act is as follows:—

"Nothing herein or in the special Act authorizing the issue of debenture stock contained shall in any way affect any mortgage or bond at any time legally granted by the company before the creation of such stock or any power of the company to raise money on mortgage or bond, but the holders of all such mortgages and bonds shall during the continuance thereof respectively

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be entitled to the same priorities, rights, and privileges in all respects as they would have been entitled to if the special Act authorizing the issue of debenture stock had not been passed."

These enactments were varied by the *Cornwall Minerals Railway Act*, 1873, the 11th section of which enacted as follows:—

"The company may create and issue debenture stock subject to the provisions of Part III. of the *Companies Clauses Act*, 1863, but notwithstanding anything therein contained the interest of all debenture stock at any time created and issued by the company shall rank *pari passu* with the interest of all mortgages at any time granted by the company, and shall have priority over all principal moneys secured by such mortgages."

At a special general meeting of the company, held on the 7th of August, 1873, a resolution was passed authorizing the directors to borrow on mortgage any sum or sums not exceeding £250,000, and if, after having borrowed any part of the money so authorized to be borrowed, the company should pay off the same, to reborrow the amount paid off, and also "to raise the said sum of £250,000, or any part thereof, by the creation and issue of" debenture stock bearing a fixed and perpetual irredeemable yearly dividend or rate of interest not exceeding £5 per cent. per annum.

In pursuance of this resolution and before the 28th of August, 1874, the sum of £226,400 was raised by the company on mortgage, and mortgages to that amount for short fixed periods were issued by the company.

On the 28th of August, 1874, the directors passed resolutions (1) that the sum of £23,600, being the balance of the £250,000, should be raised by the creation and issue of debenture stock bearing £5 per cent. interest in lieu of mortgages or debentures; (2) that the holder of any mortgage or debenture already issued desirous of being paid off before maturity might reinvest in debenture stock, and that the amount so paid should "be reborrowed by the creation and issue of debenture stock"; and (3) that the principal sum due upon any mortgage or debenture already issued and which might be paid off at maturity, should be reborrowed on debenture stock.

Pursuant to these resolutions, and before the 19th of July, 1875, £45,325 £5 per cent. debenture stock was issued by the company, of which £23,600 was an original issue, and £21,725 was issued partly in exchange for and partly to raise moneys to pay off mortgages for the like sum already issued, leaving £204,675 on mortgages which with the £45,325 debentures were on the 19th of July, 1875, subsisting as the securities issued by the company under the borrowing powers of the Act of 1873.

On the 19th of July, 1875, the *Cornwall Minerals Railway Act* was passed. That Act contained the same provisions as to incorporation as the Act of 1873, and after empowering the company to raise additional capital not exceeding £75,000, and (by sect. 13) in respect of such additional capital, from time to time to borrow on mortgage any sum not exceeding £25,000, it enacted in sects. 14 and 15 as follows:—

"(14.) The principal moneys secured by all mortgages granted by the company in pursuance of the powers of any Act of Parliament before the passing of this Act and subsisting at the passing hereof, shall, during the continuance of such mortgages, have priority over the principal moneys secured by any mortgages granted by virtue of this Act.

"(15.) The company may create and issue debenture stock, subject to the provisions of Part III. of the *Companies Clauses Act*, 1863, but notwithstanding anything therein contained the interest of all debenture stock at any time after the passing of this Act created and issued by the company shall rank *pari passu* with the interest of all mortgages at any time after the passing of this Act granted by the company, and shall have priority over all principal moneys secured by such mortgages."

No part of the £25,000 mentioned in the 13th section of the Act of 1875 was raised by the company previously to the 10th of August, 1877, but after the resolutions of August, 1874 and the passing of the Act of 1875 the further sum of £163,675 debenture stock was, under the powers of the Act of 1873, issued, partly in exchange for, and partly to raise moneys to pay off the mortgages already issued; and on the 10th of August, 1877, the said sums of £45,325 and £163,675 debenture stock, and the sum of

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£41,000 then outstanding on mortgages, constituted the securities issued by the company under the Act of 1873.

On the 10th of August, 1877, the *Cornwall Minerals Railway Act*, 1877, was passed. That Act confirmed certain purchase agreements entered into by the company, and (by sect. 8), for the purpose of paying the purchase-money, empowered the company to raise any sum not exceeding £100,000 by the creation and issue of debenture stock bearing interest at £4 per cent., under provisions precisely similar to those contained in the 15th section of the Act of 1875.

At a general meeting of the company, held on the 4th of August, 1877, a resolution was passed authorizing the directors to raise under the Act of 1875 the sum of £25,000 by the creation and issue of £4 per cent. debenture stock, "ranking *pari passu* with the existing debenture stock;" and the meeting was adjourned to the 23rd of August, 1877, when a further resolution was passed authorizing the directors to raise, for the purposes and under the powers of the Act of 1877, the sum of £100,000 by the creation and issue of debenture stock ranking similarly.

After these resolutions the directors issued, under the Act of 1873, £9270 £4 per cent. debenture stock, whereby the existing mortgages of the company were reduced to the sum of £31,730, which, with the said sums of £45,325 and £163,675 £5 per cent., and £9270 £4 per cent. debenture stock (being altogether £218,270 debenture stock), made up the £250,000 which the company was authorized to borrow under the Act of 1873; and these sums of stock and mortgages were still existing and outstanding.

Pursuant and subsequently to the last mentioned resolutions, the company also issued the further sum of £125,000 £4 per cent. debenture stock, being the sum authorized under the powers of the Acts of 1875 and 1877. This issue was made in one sum and without any distinction between the sums of stock by the two Acts respectively authorized. The purchase-money mentioned in the Act of 1877 was paid out of the money raised by the issues of debenture stock authorized by that Act, and the £25,000 debenture stock raised under the Act of 1875 was applied partly for the purposes of the Act of 1877 and partly for the purposes of

the earlier Acts, and the whole £125,000 £4 per cent. debenture stock was still in existence.

The Plaintiffs were the holders of £5 per cent. debenture stock issued under the Act of 1873 to the amount of £85,275, of which £15,815 was issued prior, and the residue subsequently, to the passing of the Act of 1875.

The Defendant *William Fenton* was the holder of £10,000 £4 per cent. debenture stock, part of the £125,000 created and issued under the Acts of 1875 and 1877.

The Defendant *Thomas Brassey* was the holder of five overdue mortgages for the sum of £1000 each granted by the company under the Act of 1873.

The company had recently fallen into difficulties; its revenues were insufficient for the payment in full of interest on its mortgages and debenture stocks, and a receiver having been appointed by the Vice-Chancellor in March last, questions arose as to the order in which the interest on the several classes of debenture stock and mortgages, and the principal of the mortgages, ought to be borne. This action was accordingly brought for the purpose of obtaining the decision of the Court upon these questions; and they were now brought before the Court by a special case stated in the action by the parties pursuant to Order XXXIV., rule 1, and in order to have such judgment entered in the action as to the Court should seem proper, having regard to the answers to be given to the questions.

The questions so stated were as follows:—

1. Whether the interest on the mortgages granted or the debenture stock created and issued by the company under the Act of 1873 had priority over the interest on the whole or any and what part of the debenture stock created and issued under the Acts of 1875 and 1877 or either of them.

2. Whether the interest on the mortgages granted or the debenture stock created and issued previous to the passing of the Act of 1875 and now in existence had priority over the interest on the whole of the debenture stock created and issued after that date, or how the several mortgages and debenture stock of the company ranked for interest *inter se*.

3. Whether the principal moneys of as well such of the mortgages

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as were now due as also of such as should hereafter become due were repayable next after the interest of such mortgages and of any debenture stock ranking as regards interest *pari passu* with such mortgages in priority to the interest of other subsequent debenture stock, or in what order the principal of such mortgages ranked with the interest of the mortgages and debenture stock.

4. Whether the holders of mortgages of the company which had not yet become due were entitled to a lien in respect of the principal to become due upon their said mortgages on the funds now in the hands of the receiver and hereafter to come into his hands.

5. How and by whom the costs of the action and special case were to be borne.

Kay, Q.C., *Kekewich*, Q.C., and *Stirling*, for the Plaintiffs, who were holders of debenture stock issued under the Act of 1873:—

Where there are successive borrowings by a railway company under successive Acts, either upon mortgage or by the issue of debenture stock, *primâ facie* the borrowings under the subsequent Acts must be subsequent in point of priority to the borrowings under the prior Acts unless there is express enactment to the contrary, for in the absence of such enactment no subsequent power of borrowing can enable the company to diminish the security of the first lenders; and it is for the subsequent lenders claiming to rank *pari passu* with prior lenders to point out the special provisions which give them that rank. There are, however, none such. The Act of 1873 incorporates, first, the *Companies Act* of 1845; and sects. 38 to 43 of that Act, which relate to the borrowing of money by the company on mortgage or bond, only amount to this, that all mortgages for the sum authorized by the special Act to be borrowed or reborrowed shall rank *pari passu* between themselves; secondly, it incorporates Part III., containing the provisions with regard to debenture stock of the *Companies Clauses Act* of 1863, and as those provisions all refer to the debenture stock to be issued under an Act of Parliament incorporating that Act they very properly provide in sect. 24 that whatever the dates and circumstances of the issue the holders of debenture stock shall not as between themselves be entitled to any preference or priority. But that clearly means the holders

of debenture stock issued under the special Act, and not under subsequent Acts, and there is no enactment that if the issue of debenture stock should be afterwards authorized by a subsequent Act, that such later stock is to rank *pari passu* with the earlier. And the case is made doubly clear by sect. 30 of the Act of 1863, by which if before the creation of debenture stock under the special Act the company shall have granted mortgages, those mortgages are to have priority over the debenture stock. There being then, according to existing law, this priority in favour of mortgages over debenture stock, the Act of 1873, while authorizing the issue of both, provides with express reference to such issue that the interest of all debenture stock "at any time created and issued" shall rank *pari passu* with the interest of all mortgages "at any time" granted by the company. And those words "at any time" manifestly apply to and are satisfied by creations and issues at different times under the special Act and cannot mean creations and issues under subsequent Acts, for such a meaning would practically prevent the exercise of the borrowing power by deterring all lenders.

Hastings, Q.C., and *Prior*, for the company, took no part in the argument.

W. Pearson, Q.C., and *Norton*, for the Defendant *Brassey*:—

We support the Plaintiff's case, and contend further that both the interest and the principal due on the mortgages under the Act of 1873 have priority over the debenture stock created under the Acts of 1875 and 1877.

Under the 10th section of the Act of 1873 the mortgagees may enforce payment of their arrears of interest by the appointment of a receiver, and of their principal in the same way when the arrears of principal amount to £20,000; so that we are entitled immediately to a receiver for the collection of everything mortgaged to us, and to have his receipts applied in satisfaction of the arrears of interest and of principal as far as it is due. Then by the prior Act of 1845, passed when debenture stock was unknown, and incorporated with the Act of 1873, the company, authorized to borrow on mortgage, is to secure the money borrowed by assign-

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ing to the mortgagee the undertaking and all tolls and sums of money arising by virtue of the special Act. So that we have, as mortgagees under the Act of 1873, a right to everything comprised in our mortgage, and to have a receiver appointed; and our rights as creditors of the company can only be taken away or diminished by our own assent and contract, or by Act of Parliament, and neither the Act of 1875 nor that of 1877 has created in any one the right to rank *pari passu* with or prior to us. Debenture stock holders are not creditors of the company at all, they are simply purchasers of so much perpetual stock in the company entitled to a preferential dividend; and the holders of such stock, under the Acts of 1875 and 1877, must rest their case entirely on the Act of 1863 and the particular special Acts, for as between them and us the provisions as to debenture stock in the Act of 1873 have no application. Under the Act of 1863, sect. 23, they have a charge upon the undertaking of the company "prior to all shares or stock of the company," and nothing more; and there is nothing whatever to affect or take away from the mortgagees that which had been already assigned to them. The rights of the mortgagees as paramount incumbrancers are distinctly recognised by the 24th, 26th, and 30th sections.

Coming to the Acts of 1875 and 1877, the former empowered the company to raise additional capital to the extent of £75,000, and in respect of such additional capital to borrow on mortgage to the extent of £25,000, and it is only by the incorporation of the Act of 1863 that debenture stock could be issued at all; and by the 14th and 15th sections of the Act of 1875 (which are the only material sections) the principal moneys secured by all mortgages under that Act are expressly postponed to those secured by mortgage under the Act of 1873, and the interest of all debenture stock created after the Act is to rank *pari passu* with the interest of the mortgages so postponed and in priority to the principal moneys secured by those mortgages. So the priorities under the Acts of 1845 and 1863 are unaffected as to the mortgages under the Act of 1873; and similar observations apply to the Act of 1877.

[They also referred to *Robinson* v. *Cambrian Railways Company* (1).]

(1) 17 W. R. 441.

Davey, Q.C., and *Medd*, for Mr. *Fenton*, a holder of part of the £125,000 debenture stock issued under the Acts of 1875 and 1877:—

All the debenture stock whenever issued ranks *pari passu inter se*, with the interest of the mortgages granted by the company. It is inaccurate to speak of "borrowing" on debenture stock. The power is a power to "raise," not to borrow, and the money paid for the debenture stock is not money borrowed by the company, but money received by them for the purchase of stock with a preferential dividend charged. The incidents attending borrowed money are wanting, and wanting because it is stock and not borrowed money, and as between debenture stocks of different issues, stock created under an earlier Act has no priority over stock created under a later Act. The only similarity between debenture stock and money raised by debentures is that, unlike the holders of ordinary shares, the holders of the stock have a charge which they can enforce by means of a receiver. The general nature of debenture stock is illustrated by the case of *Attree* v. *Hawe* (1).

There being then this equality of rank between all debenture stock whenever issued, the Act of 1873 had before the passing of the Act of 1875 given to the holders of that stock the right to rank *pari passu* as to interest with all mortgages "at any time granted" by the company. And why are we to suppose that the Legislature does not mean what it says, and to restrict the words "at any time" to mortgages under the special Act, when it is plain they were put in to avoid that narrow construction? Those words do not affect the priority of the mortgages *inter se*.

[HALL, V.C.:—That is to say, that in effect it is a prospective clause, embracing and dealing with debenture stock which might be created under a subsequent Act of Parliament, and also mortgages which might be created under a subsequent Act of Parliament.]

As the words "all debenture stock at any time created" include the holders of all stock under whatever Act, so in the same way do the words "all mortgages at any time granted" bear the same

(1) 9 Ch. D. 337, 349.

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construction. And so before the passing of the Acts of 1875 and 1877 the relative position of debenture stock holders and mortgagees was regulated, and there is nothing in the subsequent Acts which alters it. It is said that it would be a great hardship upon the holders of debenture stock issued under the Act of 1873, and that they would be practically swallowed up, if stock issued under a subsequent Act were let in to rank *pari passu* with theirs; but there is no hardship at all, first, because the Act of Parliament puts them in that position (which is likewise the position of all share and stock holders); secondly, because subsequent issues are only authorized in proportion to an increase in the share capital, and if not, the money goes into the concern and increases *pro ratâ* its dividend; and thirdly, because the debenture stock holders would have a *locus standi*, and could oppose the fresh issue if they chose.

Kay, in reply.

Aug. 7. HALL, V.C.:—

By the Act of 1873, which incorporated the company, the company was, by sect. 9, empowered to borrow on mortgage any sum not exceeding £250,000, and by the joint operation of sect. 11 of the Act of 1873 and sect. 22 of the *Companies Clauses Act*, 1863, to raise that sum by the creation and issue of debenture stock. Then, it being provided by sect. 24 of the Act of 1863 that interest on debenture stock should rank next to the interest on mortgages for the time being of the company, legally granted before the creation of the stock, the 11th section of the Act of 1873 substituted for that clause an enactment that, "notwithstanding anything therein" (*i.e.*, in the Act of 1863) "contained, the interest of all debenture stock at any time created and issued by the company shall rank *pari passu* with the interest of all mortgages at any time granted by the company, and shall have priority over all principal moneys secured by such mortgages." The Act of 1863 makes the priorities of interest on mortgages and interest on debenture stock depend upon the order of their being granted and created. The Act of 1873 makes interest on mortgages and debenture stock rank *pari passu* without reference to

the dates of their being granted or created. Whether that enactment in the Act of 1873 should be construed as applying only to the debenture stock and the mortgage debt for which provision was made by that Act, or whether by reason of the expressions used being "all" debenture stock "at any time" created, and all mortgages "at any time" granted, it should be construed as applicable to and comprising debenture stock and mortgages which might be authorized to be created and granted by any subsequent statute, must first be determined.

I think that the former construction of the clause is the correct one.

The enactment as to priority forms part of the clause which authorizes the creation of debenture stock, the amount of which was limited by the borrowing power, and the words "but notwithstanding" seem to me so connected with, and so integral a part of the power to raise the sum limited by the enactment itself, as that the enactment is applicable only to that sum. And I say this even should the above observations be considered inapplicable to the construction to be put on the 15th section of the Act of 1875, which section I shall have to consider hereafter. I however think that, independently of what I have said, it would be an unreasonable and unsound construction of the enactment to read it as applicable to any other mortgages or debenture stock than those which the Act itself makes provision for. Mortgages could not be negotiated if they were to be subject to subsequently authorized mortgages and debenture stock being let in to be, as regards interest, *pari passu* with them, and also as regards interest to have priority over the principal moneys. The words "at any time" are satisfied by being required to provide for the specified equality between mortgages and debenture stock for the whole of the £250,000, regardless of the order of granting and creation thereof. Also debenture stock would not be taken by any person who understood what his position would be if the interest were liable to be made payable *pari passu* with the interest of debenture stock or mortgages authorized by subsequent Acts to be created.

Sect. 30 of the Act of 1863 was referred to, but that section does not give to debenture stock created under any subsequent Act equality, regard being had to the 11th section of the Act of

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1873, creating, as I hold that section to do, a specified fixed l equality as between mortgages and debenture stock provide by that Act.

[His Lordship, after referring to the 14th section of the A 1875, stated the 15th section, and continued :—] Has that c any operation as to debenture stock created after the passi that Act under the Act of 1873 and the subsequent Act of or either of those two Acts ?

I am of opinion that it has not any reference to, or oper as to, moneys authorized by the Act of 1877 to be raised. other construction would, I think, be unreasonable and uns as I have said in giving my reasons for the construction I put on the 11th section of the Act of 1873. The other re given by me for the construction put by me on that se may be thought to be inapplicable or less applicable to the struction to be put on the 15th section. That section has ence to the £25,000 raisable under the Act of 1875, and I it applies also to any debenture stock which might thereaft created under the Act of 1873. The 14th section shews tha principal of moneys then secured by mortgages was, but during the continuance thereof, to have priority over mo raised by mortgages granted under the Act of 1875; and Act of 1875 thus deals with existing mortgages, *i.e.*, it deals what was provided for by the Act of 1873, and not merely what was provided for by the Act of 1875.

The Act is not to be read as not having any relation to other Act. But independently of this, the 15th section d guishes debenture stock created "after the passing of this from that previously created. The words "after the passin

Nevertheless, I do not see that any holder of any part of the £125,000 debenture stock can establish any equality with any holder of stock issued before the passing of the Act of 1877, because no part of the £125,000 has been created under the Act of 1875 only, but the whole thereof has been created under the Acts of 1875 and 1877. Further, the 8th section of the Act of 1877, reading it as I read the Act of 1875, applies to the £25,000 as well as to the £100,000, the whole £125,000 being thus treated as on an equality. No distinct question is expressly raised in the special case as to the £9270 £4 per cent. debenture stock; and the same counsel represented the holders of that sum of stock and the holders of the other part of the £218,270 raised under the Act of 1873. I think I cannot, upon the argument addressed to me, treat the £9270 as in any other position than the £218,270. The amount is not considerable: I treat it as in the same position as the £218,270.

As regards the principal of the remaining mortgage debt, sect. 10 of the Act of 1873 provides for the mortgagees enforcing payment of interest or principal due on their mortgages by the appointment of a receiver upon the application of mortgagees for £20,000.

I think that the first and second questions must be answered that the interest on the subsisting mortgages and debenture stock created and issued by the Defendant company under the provisions of the *Cornwall Minerals Railway Act*, 1873, has priority over the interest on the whole of the £125,000 debenture stock created and issued by the Defendant company under the provisions of the *Cornwall Minerals Railway Act*, 1875, and the *Cornwall Minerals Railway Act*, 1877, and that the interest so having priority is payable *pari passu* to the mortgagees and holders of debenture stock having such priority.

The answer to the third question is that the principal of the mortgages for the time being due has, by means of the appointment of a receiver under sect. 10 of the Act of 1873, priority of payment next after the interest having priority as mentioned in the answer to the first and second questions. It will be observed that I have answered that question only by saying that they have that priority by means of the appointment of a receiver under sect. 10.

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It does not appear, however, that any such receiver has in fact been appointed.

The fourth question, as to the necessity of retaining funds to answer future interest, is answered in the negative. The answer to the fifth question is that the costs of the action and special case ought to be borne and paid out of the moneys in the hands of the receiver as the first payment thereout.

Kekewich, Q.C.:—This being a special case, not under Sir *George Turner's Act*, but under the 34th section of the *Judicature Act*, it will be the proper course, instead of taking your Lordship's decision as answers to the questions, to take it as a judgment making declarations to the same effect. In a recent special case of *Williams* v. *Williams* (unreported on this point) before the Court of Appeal, it was suggested that as no judgment had been delivered the action had never been tried, and the application was only interlocutory, and the Court of Appeal held that if the answers to the special case fully disposed of the action they ought to be followed by the words "and the Court doth declare accordingly," and with consent they directed the order of the Court below to be so altered.

No objection being made to this, the action was *pro formâ* set down for trial as for the day of the hearing of the special case; and

Kekewich, Q.C., having moved for judgment according to his Lordship's decision, the Registrar was directed to draw up the judgment as answering the special case and on motion for judgment.

Solicitors: *Murray, Hutchins, & Stirling; Cope & Co; Maples & Teesdale; Norton, Rose, Norton, & Brewer.*

SLACK *v.* MIDLAND RAILWAY COMPANY.

FRY, J.
1880
Nov. 20.

[1879 S. 197.]

Practice—Inquiry as to Damages—Costs.

When an injunction is granted to restrain the committing of a nuisance, and an inquiry as to damages is directed in Chambers, though the plaintiff is entitled to the general costs of the action, the costs of the inquiry will be reserved, in order that the Judge may have complete control over them, and be able to see that they are not unreasonably exaggerated.

THIS action was brought to restrain the Defendants from fouling a stream called the *Hipper*, at *Chesterfield*, by allowing gas tar to flow into it from some gasworks belonging to them. The Plaintiffs also claimed damages.

T. Aston, Q.C., *North*, Q.C., and *L. Field*, for the Plaintiffs.

Davey, Q.C., and *W. Phipson Beale*, for the Defendants.

FRY, J., held on the evidence that the alleged nuisance had been proved, and granted a perpetual injunction. He also directed an inquiry as to damages, and gave the Plaintiffs the costs of the action.

Davey, Q.C., asked that the inquiry might take place before one of the official referees.

FRY, J., said that the usual practice was to direct the inquiry to be made by the Chief Clerk.

Davey, Q.C.:—The costs of the inquiry should be reserved, otherwise the Plaintiffs may file unnecessary affidavits.

FRY, J.:—

I think that is a very good practice, and I have adopted it in other cases. I shall give the Plaintiffs the general costs of the action, but I shall reserve the costs of the inquiry. My reason for doing so is this—not with the view of excusing the Defendants

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from paying those costs, but in order that the Judge before whom the inquiry is conducted may have full control over the costs, and see that they are not unreasonably exaggerated.

Solicitors for Plaintiffs: *Field, Roscoe, & Co.*
Solicitors for Defendants: *Beale, Marigold, & Co.*

In re ALBION LIFE ASSURANCE SOCIETY.

C. A. 1880 Nov. 3.

Mutual Insurance Society—Contributory—Liability of Shareholders and participating Policy-holders inter se—Partnership—Participation in Profit and Loss.

The articles of association of an unlimited mutual insurance society provided that the company should at first consist of two classes of members, namely, shareholders, so long as there should be any, and assurance members, who were policy-holders with participation in the profits and registered as members; and that when the shareholders should be paid off under the scheme provided for, then the company should consist of assurance members only. The shareholders were to have £6 per cent. on their paid-up calls, and every three years the profits were to be calculated, and one-fourth paid to the shareholders, and the other three-fourths carried to the assurance fund and appropriated by way of bonus to the policies of the participating policy-holders who had paid five years' premiums. The company was wound up before the shareholders had been paid off, and the participating policy-holders were declared by the Court to be contributories:—

Held (affirming the decision of *Malins*, V.C.), that although the participating policy-holders were members and contributories under the special terms of the articles, they could not be called upon to contribute until the shareholders had been exhausted.

The presumption of law that in the absence of express stipulation partners must share losses in the same proportion as they share profits, *held* not to apply to such a case, the assured members having no direct participation in profits.

THIS was an appeal from a decision of Vice-Chancellor *Malins* in the winding-up of the *Albion Life Assurance Society* (1).

The society was an unlimited company. Its nominal capital consisted of £50,000 in £10 shares. The following were the principal clauses of the articles of association which were referred to in the argument:—

Clause 2 provided that the company should consist of two classes of members, viz.: the shareholders and assurance members for the time being, so long as there should be any shareholders, and afterwards of the assurance members for the time being only; "assurance members" being defined as "every person for the time being holding a subsisting policy of assurance with the company

(1) 15 Ch. D. 79.

C. A. 1880 *In re* Albion Life Assurance Society.

for the whole term of life on the terms of participating in the profits of the company, and duly registered as a member of the company."

Clause 5 provided that the capital should be subject to be paid off as thereinafter provided, and in the meantime should be deemed a "guarantee fund" over and above the accumulation from or in respect of profits.

By clause 6 interest at the rate of 6 per cent. per annum was to be paid to the shareholders out of the profits of the company on the amount of the calls for the time being paid up on their respective shares.

By clause 11 the general fund of the company, other than the subscription capital, was to be called the "assurance fund," and was to consist of all premiums, fines, and other moneys to be received by the company in respect of policies of assurance, annuities, or endowments originally granted or undertaken by the company, and the assurance fund was to be the fund applicable for the payment of interest on the shares and of such other engagements and liabilities of the company as the directors should from time to time think fit to pay thereout.

By clause 12 at the expiration of every three years a calculation was to be made of the amount of the assets and liabilities of the company and of the profits or estimated profits of the assurance fund, and the directors were to declare the amount which, on the result of such calculation, might at each such period be safely dealt with as net profits of the assurance fund.

By clause 13 the amount of net profits so declared was to be appropriated thus—one-fourth among the shareholders (if any) and the other three-fourths, or the whole (if the capital should have been paid off) by way of bonus among the holders of such policies issued by the company on the terms of participating in profits as should be subsisting at the period fixed for each periodical account, and on which at least five years' premiums should be paid in full, regard being had to the dates of the policies, the ages of the lives thereby assured, and other circumstances of the several cases.

Clause 14 provided that whenever the amount of net profits standing to the credit of the assurance fund should be equal to

double the amount of the bonuses which would be payable to the shareholders if this clause were acted on, the directors should, with the sanction of an extraordinary general meeting, repay to each shareholder the amount of his capital actually paid up, together with a bonus of 50 per cent on the amount paid up.

Clause 15 is as follows: "In case the subscription capital shall be so paid off, the guarantee fund shall thereupon be distributed, and the shareholders shall be discharged as respects the company and indemnified by the company as respects strangers, from all further obligations and liabilities in respect of their shares, and from all the rules and regulations of the company . . . and the balance then standing to the credit of the assurance fund shall, together with all accumulations and additions thereto, thenceforth be the only fund for receiving and paying all moneys in respect of the transactions of the company."

By clause 17 the bonus apportioned to any policy was to be added to the policy and to be payable therewith in reversion, but without interest, and was in the meantime to be retained and applied in like manner as the other capital of the company; but power was given to the directors to pay to any policy-holder, who gave notice within a month after the apportionment of the bonus, the then present value of his bonus.

Every policy issued by the society contained a proviso that it was to be satisfied only out of the funds or property of the company, and that the members of the company should not be personally liable in respect thereof.

The company was ordered to be wound up in March, 1878; and it was decided by Mr. Justice *Fry* in *Winstone's Case* (1) that the assurance members or participating policy-holders were to be contributories. In pursuance of this decision a list of policy-holding contributories had been settled.

Calls had been made upon the shareholders of £20 in respect of each share, being £10 the nominal amount, and £10 more; and the official liquidator proposed to make a call on the participating policy-holders to the amount of double the actual value of each policy.

The participating policy-holders contended that as between

(1) 12 Ch. D. 239.

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them and the shareholders they ought not to be called upon to contribute anything until the shareholders had been exhausted.

A summons having been taken out by the official liquidator for the settlement of the question, the Vice-Chancellor decided in favour of the participating policy-holders, and the shareholders appealed from this decision.

Higgins, Q.C., and *Davey*, Q.C. (*W. H. Green* with them), for the Appellants:—

It may be fairly contended that on a true construction of the articles the shareholders were not intended to be responsible for more than £10 per share, and that this was to form a guarantee fund, the participating policy-holders being primarily responsible (clauses 5, 15). But, without pressing this construction, and admitting that the shareholders are partners equally with the participating shareholders, we contend that there is no difference in priority of liability between the two classes; nor is there any contract, express or implied, that the shareholders should indemnify the participating policy-holders. Secondly, the proportions in which the partners must bear the losses must follow the proportion in which they participate in the profits. That is the ordinary rule in all partnerships where there is no express contract as to the proportion in which the liabilities are to be borne. Now, according to these articles the shareholders, after receiving interest on their paid-up capital, are to have one-fourth only of the profits, and the participating policy-holders are to have the other three-fourths (clause 13). Therefore that class of policy-holders ought to bear three-fourths of the liabilities.

If the Court should be against us, at all events the costs of the winding-up ought to be shared equally by the two classes.

Macnaghten, Q.C., and *Borthwick*, for the participating policy-holders:—

We do not now dispute that the participating policy-holders are members of the company, and must contribute to its debts—that has been decided by Mr. Justice *Fry*—but they are not partners for all purposes. Even if there had been a participation of profits between them and the shareholders, that would not have been

conclusive as to the existence of a partnership: *Cox* v. *Hickman* (1). But there was in truth no participation in profits. It was not an ordinary mutual insurance company. It was a shareholders' company, capable of being turned into a mutual insurance company by paying off the shareholders at an enormous premium. Until that took place the primary liability was on the shareholders who found the capital. No fixed proportion of the profits was paid to the policy-holders, but a certain proportion was carried every three years to the insurance fund for the benefit of some, not all, of the participating policy-holders. And as the insurance fund was liable to the payment of all the policies, each participating policy-holder had at the best only a reversionary interest in an uncertain share of the profits. In such a case the presumption of law that, in the absence of express stipulation, the partners should share the liabilities in the same proportion as the losses, cannot arise.

Glasse, Q.C., and *Boome*, for the official liquidator.

Higgins, in reply.

JESSEL, M.R.:—

The question which we have to decide on this appeal appears to me to depend simply on this consideration—there being no express provision in the articles of association as to the manner in which the losses are to be borne when the shareholders' capital is exhausted, what is the fair inference to be drawn from the articles? It is said, as a general proposition of law, that in ordinary mercantile partnerships where there is a community of profits in a definite proportion, the fair inference is that the losses are to be shared in the same proportion. I entirely assent to that proposition, although it seems that no positive authority can be adduced in support of it. But it must be logically carried out to its legitimate extent. In cases where that question arises, and the capital has been contributed by the parties in unequal proportions, and that capital is lost, and has to be made good by the partners, it must be made good by them in the same proportions as any other

(1) 8 H. L. C. 268.

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loss.' In other words, it is a matter of contract between the parties, and it is assumed, there being no express provision with respect to the proportion in the articles, that this was the contract between them.

But we have here a very different state of circumstances. There is only this in common to the two cases, that there is no provision as to the proportion in which the losses are to be ultimately borne. It must be remembered what this company was. It was started by a certain number of shareholders, and was to be an insurance company with the means of converting it into a mutual company, but only on the repayment of the capital advanced by the shareholders, with a very large percentage by way of bonus. The scheme was that they were to have 6 per cent. on their subscribed capital together with one-fourth of the profits, and a bonus of 50 per cent. on the capital, if the capital was returned to them. It was a commercial undertaking from which they expected a very large profit. On the other hand, the policy-holders, who participated, were to receive nothing, except that at triennial periods a proportion of three-fourths of the profits was to be attributed to their policies, by way of reversionary bonus—and that only on policies on which five years' premiums had been paid. It was only an addition to the amount payable on the policies, and it was only payable out of the funds of the company: so that if the company failed they would get nothing. If there had been nothing more in the articles, I should have thought there was no partnership at all between the policy-holders and the shareholders. Although the bonus was declared in proportion to the profits, it was not really a payment out of the profits: it was in fact a return of the excess of the premiums paid above the amount necessary to secure the policies: and even if it had been more clearly a share of the profits, since the decision of the House of Lords in *Cox* v. *Hickman* (1), it does not follow that people are partners merely because they have a share in the profits in an indirect way. But there is the additional fact that the participating policy-holders are made members of the company, and therefore as against outside creditors they become liable to the debts of the company, as Mr. Justice *Fry* has decided in *Winstone's Case* (2). It may well be that they

(1) 8 H. L. C. 268. (2) 12 Ch. D. 239.

are in some sense partners, or *quasi* partners, but the question still remains to what extent they are liable.

First, then, have we anything in these articles which gives them a definite proportion of the profits from which any inference as to their liability to the losses can arise? If one class have 6 per cent. and the others a share of the residue, how can you arrive at a definite proportion?

First, there is the 6 per cent. to be paid out of the profits, then the residue of the profits is to be thus applied—one-fourth to the shareholders, and the other three-fourths, not paid to the policy-holders, but carried to an assurance fund, and the profits accumulated in that fund; and that fund is applicable to the non-participating policies as well as to participating, and no one can say that any of it will come to the participating policy-holders at all.

How can you find the proportion of the interest of the policy-holders in such a case? The value of the reversion due to one policy-holder will be very different from the value of the reversion due to another. Therefore, in my opinion, there is no mode of finding the proportion of loss which the policy-holders ought to bear by reference to their proportion of the profits of the company.

Then, if no inference can be drawn from the articles, how can losses be divided? I can see only two ways—one, which the Vice-Chancellor has adopted, by treating the shareholders as having really carried on the business, and throwing the loss primarily on them; the other, by dividing the losses among the members *per capita*.

The second course would be so unjust and unreasonable, that it has not been argued by either side. We cannot suppose that any reasonable man would join a company on the understanding that his liability in respect of £500 was to be the same as if he were interested to the extent of £5000; and although I agree that where the terms of a contract are clear, the absurdity of the conditions cannot override the plain meaning, yet if the terms are not clear, you are not to construe them so as to arrive at an irrational conclusion.

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Let us look at the terms of the contract as to the capital contributed by the shareholders; for, if we come to the conclusion that the capital is applicable to the payment of the debts, it appears to me to follow that, if that be exhausted, the deficiency should be made up by those who provided the capital. If all the members had contributed the capital equally *per capita*, the loss of capital would have to be made up in the same way. Moreover, the capital in this case was not only liable for the debts, but also for the payment of the policies. So that it was to form a guarantee fund for payment of the policies. This is clear from the 5th, 6th, 11th and 14th clauses of the articles. That being so, and there being no contract to provide further capital, what are we to infer if that happened which is not provided for, namely, a loss of capital? It is not reasonable to suppose that it was intended that if the capital proved insufficient, the policy-holders were not only to lose their premiums, but to pay the excess of the debts of the company after the capital had been expended.

I think the fair inference is that the same persons who contributed the capital should first contribute to the debts, now that the capital is exhausted. Therefore I agree in the conclusion of the Vice-Chancellor, though perhaps not exactly on the same grounds.

JAMES, L.J.:—

I also agree with the conclusion of the Vice-Chancellor, and for the reasons given by the Master of the Rolls. It has not been contended before us that in the ordinary case of an insurance office issuing policies, some participating and some not, every person taking out a participating policy, which is only like taking back the excess of his premiums, is constituted a shareholder and partner, and becomes liable to all the debts of the office. An ordinary participating policy-holder does not undertake that liability. Is there, then, anything in these articles to shew that policy-holders in this company intended to enter into such a contract? I do not think that provisions about their right to attend meetings or vote are sufficient to constitute a contract entirely different from the ordinary contract between the shareholders and

policy-holders of an insurance office. Every insurance office is in this sense a mutual insurance office, that the aggregate sums contributed are so calculated as to be sufficient to meet the sums required for policies. The clause making them members was only to give them control over the funds which would be applicable for their policies. These provisions do not seem to me sufficient to imply that the mutual liabilities were different from those in ordinary offices. I think that Mr. Justice *Fry* was right in saying that in this case the participating policy-holders had brought themselves within the very words of the Act, but that does not bring them under such a liability as that now contended for.

It was argued that as three-fourths of the profits were given to them and one-fourth to the shareholders, therefore the liabilities must be apportioned in the same way. That may be the ordinary rule; but that does not apply to the present case, for the effect of these articles is that the full profits go to the shareholders.

COTTON, L.J.:—

In this case Mr. Justice *Fry* has held that the participating policy-holders are liable to creditors. That was decided, not on the ground that participation in the profits constituted them partners, but on the ground that they agreed to become members of the company. We have to decide a different question. I must first mention Mr. *Higgins's* point, that the shareholders are entitled to call on the policy-holders to indemnify them. If that be so, it must be under some special clause in the contract. No such stipulation has been pointed out. Clause 15 was referred to, but there is nothing in that clause which appears to me to bear out the contention.

The main argument was on the question, whether the liabilities ought to be borne in the proportion of one-fourth and three-fourths. Mr. *Higgins* put it on this ground, that when there is no provision in articles of partnership the proportion of liability must be regulated by the proportion of profits. We are not now considering whether the policy-holders are liable to creditors, but what is the relation between them and the shareholders. That being so, I think it is clear that there is no provision for such a

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division of profits as will give rise to the rule. For the only provision is that one-fourth of the profits is to be paid to shareholders, and the other three-fourths is not to be divided among the policy-holders, but is simply to be ascertained for the purpose of fixing what addition is to be made to the policies, and that is dealt with as a general insurance fund, and is not appropriated to any one of the policy-holders. It may become applicable to the payment of the shareholders, and not to any individual policy-holder at all. No one of them could say that any part of it must come to him. Therefore there was no apportionment of profits within the rule. I think it cannot apply where the division of profits is so indefinite as this.

Therefore, if the apportionment of liability is to be made at all, it must be, as the Master of the Rolls has pointed out, either *per capita*, or in the way which the Vice-Chancellor has adopted. The first method is clearly inadmissible, and the only other alternative is, that until all the capital was repaid the company was only a proprietary company, that the shareholders as between themselves and the policy-holders were primarily liable, and that the policy-holders were not liable until the shareholders were exhausted.

I think this is the correct view, and that the conclusion at which the Vice-Chancellor arrived was correct.

Solicitors: *G. Blagden*; *V. I. Chamberlain*; *Miller, Smith, & Bell.*

BENBOW *v.* LOW.

[1879 B. 415.]

C. A.
1880
V.-C. B.
July 30,
C. A.
Nov. 4.

Practice—Discovery—Accounts—Interrogatories—Rules of Court, 1875, *Order* XXXI.

In an action to restrain the Defendants from using a trade-name and from selling their goods as the goods of the Plaintiffs, the Defendants by counter-claim claimed the like relief, and also an account of the goods sold by the Plaintiffs as and for the goods of the Defendants, and of the profits of such sale. Both Plaintiffs and Defendants claimed to derive their title under a partnership that had been dissolved in 1861, and both had since that time carried on the same business. An interrogatory exhibited by the Defendants required the Plaintiffs to set forth the quantities of goods sold by them since 1861, distinguishing the quantities sold in each year :—

Held (affirming the decision of *Bacon*, V.C.), that the interrogatory was not for the ordinary purposes of discovery, but was directed to the details of the Plaintiffs' evidence, and was rightly disallowed.

Saunders v. *Jones* (1) explained and discussed.

THIS action was brought to restrain the Defendants from using a trade name, viz., "*Low's Highly Perfumed Brown Windsor Soap*," either with or without certain labels or wrappers, and from selling their soap as the Plaintiffs'. The Defendants, by their counter-claim, claimed similar relief; and also claimed an account of all soap sold by the Plaintiffs as and for soap sold by the Defendants, and of the profits of such sale.

Both Plaintiffs and Defendants claimed their right under two persons who were in business in partnership up to the year 1861, and made and sold this particular soap under this particular name. In that year the partnership was dissolved, and the respective predecessors of the Plaintiffs and Defendants set up separate businesses for the manufacture of soap.

The question now in dispute was, who was entitled to use the name and wrappers originally applied to and used with the soap?

The Defendants, amongst other interrogatories, exhibited the following :—

"Let the Plaintiffs set forth the respective quantities of soap

(1) 7 Ch. D. 435.

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sold by them and their predecessors in business in connection with their labels and wrappers, bearing the Plaintiffs' alleged trade-mark, from the year 1862 to the year 1879, both inclusive; distinguishing between the quantities sold in each year, and distinguishing between the quantities sold in *England* and in the *United States of America*, and on the continent of *Europe* respectively."

The Plaintiffs declined to answer this interrogatory on the following amongst other grounds: "that the accounts here asked for form part of the relief sought by the Defendants' counter-claim, and that the Defendants are not entitled to such accounts until after they have obtained judgment in their favour on their counter-claim; that such accounts are not necessary for the trial of the action; and that the interrogatory is not material at this stage of the action."

A summons was taken out by the Defendants, which was adjourned into Court, to compel the Plaintiffs to answer the interrogatory, and came on for hearing before Vice-Chancellor *Bacon* on the 30th of July, 1880.

Sir *H. Jackson*, Q.C., and *Byrne*, for the summons:—

The Plaintiffs' objection to answer this interrogatory is only the same kind of objection as was overruled in *Saunders* v. *Jones* (1) and *Lyon* v. *Tweddell* (2). Our counter-claim raises what is practically a fresh issue, namely, as to the amount of the Plaintiffs' sales in *America* and elsewhere of goods stamped with our trade-mark.

Willis-Bund, for the Plaintiffs, was not called upon.

BACON, V.C., dismissed the application with costs, being of opinion that it was unreasonable in the highest degree, and an attempt to see the Plaintiffs' brief. The Defendants were not entitled to the discovery before the trial of the action.

C. A.

The Defendants appealed. The appeal was heard on the 4th of November.

(1) 7 Ch. D. 435. (2) 13 Ch. D. 375.

Sir *H. Jackson*, Q.C., and *Byrne*, for the Appellants, urged the same arguments as in the Court below.

Willis-Bund, for the Respondents, was not heard.

JESSEL, M.R. :—

I think there is no doubt as to what the construction of the rules in Order XXXI. ought to be. It ought to be such as to prevent dishonest persons taking advantage of the rules, because if all men were honest the rules would not be wanted at all. If you give one side the opportunity of knowing the particulars of the evidence that is to be brought against him, then you give a rogue an enormous advantage. He then may be able, although he has no evidence in support of his own case, to shape his case and his evidence altogether in such a way as to defeat entirely the ends of justice. Therefore it appears to me that the rules in question are most important and should be strictly adhered to. In the present instance, the Plaintiffs' claim is one which is quite simple. They say, "We have used a trade-mark belonging to the Defendants for many years, we have used it in carrying on our trade, openly and with the knowledge and consent of the predecessors in title of the Defendants." The Defendants simply deny it. They deny the user, and they deny the knowledge or acquiescence, and upon that issue is joined. The Plaintiffs therefore have to prove the user and the knowledge or acquiescence. The whole obligation of proof is on the Plaintiffs. The Defendants seek to destroy the Plaintiffs' case, and for that purpose they have two modes. They may either wait for the trial and watch the Plaintiffs' evidence and say it is insufficient, or they may make inquiries before the trial as to the mode in which the Plaintiffs' trade has been conducted, and they may bring evidence to shew how it has been conducted, and to shew that it has not been conducted in the manner alleged. But they want to do more than that, they want the Plaintiffs to give them the details, or a portion of the details, of the evidence which they are going to bring forward in support of their case. Now, no doubt the mode of carrying on the trade of the Plaintiffs, whether it has been openly carried on in the usual course of business, whether the

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goods have been openly offered for sale, whether they have been frequently sold, whether they have been sold in larger or smaller quantities, are all questions which have more or less bearing upon the issue to be decided, and are more or less material to the decision of that issue; but it does not follow from that, that the Defendants are entitled to all those particulars. They may be surprised at the trial, that is, they may find evidence brought forward which they were not prepared to meet, but which if they had time given them they would be able to meet. If such a case should arrive, it is provided for in two ways by the rules; they may either apply to the Judge at the trial to adjourn the trial, in order to enable them to meet it, or they may afterwards apply for a new trial on the ground of surprise; but that does not entitle them to get from the Plaintiffs the particulars of their evidence before the trial comes on.

Then it has been said, "But these are not particulars of evidence." I think they are. What they ask is this. One of the details which will have to be proved is the respective quantities of soap sold by the Plaintiffs in connection with the labels in question during every year for a great number of years. Now the Plaintiffs need not prove this at all at the trial. They need not shew the quantities sold in every year. It will be sufficient for them to shew considerable, that is, substantial quantities sold during the whole period at reasonable intervals. They need not actually prove or actually find out the quantity sold in each year, and it may be a difficult matter to ascertain. But what the Defendants want further is to shew that they have only sold small quantities. The answer is, "If they have only sold small quantities, they will only prove small quantities at the trial." But the Defendants say, "It may turn out that they have sold nothing, and then we shall not have occasion to go into any evidence. Well, if the Plaintiffs cannot prove any sales at the trial, the Defendants will not have occasion to go into evidence. But then it is said, "If they admit they have sold nothing, we shall be able to defeat them altogether, without taking any further trouble." All I can say is, that their advisers must be very sanguine indeed, if they think that that will be the answer to the interrogatory. One must look at it as a reasonable man. I

can only say that is entirely beside the point, and could only have been thrown out as a suggestion arising from the ingenuity of counsel in the course of the argument, for they really cannot expect anything of that kind.

That being the position of matters, it seems to me the Vice-Chancellor was quite correct in the conclusion at which he arrived, that this was an interrogatory directed to the details of the Plaintiffs' evidence, and not to the ordinary purposes of discovery.

Before parting with this case I should like to say a word or two upon the decision in the case of *Saunders* v. *Jones* (1), in the Appeal Court, as I was not a party to that decision, although I have acted upon it very often. As I understand that decision, the main portion of it applied to the four first interrogatories, and it amounts simply to this—Whereas at Common Law in an action for wrongful dismissal, if the defendant pleaded that he dismissed the plaintiff for misconduct, the plaintiff would have a right to the particulars of the misconduct, so that he might be able to shew at the trial that there was no misconduct, and could obtain that under a summons for better particulars; but there being a practice coming to the Chancery Division from the old Court of Chancery, not as a rule to give better particulars, although of course it could be done, but to allow the particulars to be obtained by interrogatories, especially when you have to interrogate for other purposes, there was no reason, then, for departing from the practice, it being a cheaper course of procedure and better; and therefore where there was among the interrogatories one or more simply asking for better particulars, those interrogatories should be allowed without putting the applicant to the trouble of taking out a summons for better particulars. That is all that was decided, and it is as plain as possible, because when you look at the observations of the late lamented Lord Justice *Thesiger* (2), and of Lord Justice *James* on the same page, they are directed to the point that the Plaintiff is to have the particulars of the alleged misconduct; and when you look at the judgment of Lord Justice *James* (3), He says, "He is entitled to particulars like the particulars of breaches or infringement, and

(1) 7 Ch. D. 435. (2) 7 Ch. D. 447.
(3) 7 Ch. D. 449.

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it is no sufficient answer to say 'You have not taken the right course, you ought to have applied to the Vice-Chancellor for particulars,' which is not according to the practice of the Chancery Division. The only mode in which those particulars could have been got in Chancery was by administering interrogatories, and I am of opinion that a party may still adopt that course"—not "must" but "may"—"and that the interrogatories must be answered." If he is interrogated for other purposes, an interrogatory may be added for this purpose, and that is all that is decided on the point.

The other point has nothing to do with the case before us. The other point was this, that as regards the fifth interrogatory there was a question of modified accounts, and that the Court has a discretion in requiring a defendant to answer as to the result of an account before the trial. There are cases in which the account would be complicated, and in which the plaintiff's title is denied, in which it would be refused; there are cases in which the plaintiff's title to it may be denied, as a title which is fairly open to trial, and which has to be affirmed at the trial, and where the giving of the accounts would occasion little trouble to the defendant and would be of immense advantage to the plaintiff by enabling him to get an immediate decree or order at the trial, and where the Judge in the exercise of his discretion may allow it. In the particular instance of *Saunders* v. *Jones* (1) the Judge was pleased to allow it, and the Court above not only approved the exercise of the discretion and declined to interfere, but, as I read it, expressed an opinion that they should have exercised the same discretion if it had been vested in them in the first instance in the same way. As I have already said, it has no bearing whatever upon the case before us. It appears to me that this appeal should be dismissed.

JAMES, L.J.:—

I am of the same opinion. It appears to me the question is whether this is really asking to see the brief of the other side in order to know exactly what is the evidence they are going to produce, which is not permitted, or whether it is a question which

(1) 7 Ch. D. 435.

comes within the exceptional instance which has been referred to, where a man says, "Give me particulars of the misconduct which you allege against me," which I always thought was an exceptional and particular case, and which was decided by the Court by analogy to that which is done at Common Law, where a man pleads justification to a libel, and where you are obliged to give particulars. If a man says, "I am entitled to recover an estate because you have committed breaches of covenants," the other party is entitled to ask, "Tell me what breach of covenant I have committed." The party is not allowed to see the brief beyond that, but only to know what are the particulars on which the other side are going to rely—that is the substantial particulars. That is all he is entitled to there. It appears to me that here the quantities are nothing but evidence in support of the Plaintiff's case.

COTTON, L.J.

I agree. I am of opinion that upon the pleadings as they stand the Defendants are not entitled to enforce discovery in answer to this interrogatory. The interrogatory asks for the quantities sold in each of several years. That is not in support of any case raised by the Defendants in their pleading in answer to the Plaintiffs, nor is it discovery that is wanted in order to shew the nature and character of the acts and things relied upon by the Plaintiffs, who state by their pleadings that they have sold soap to a large extent, and indeed both in *Europe* and in *America*, so that it does not at all come within the principle of *Saunders* v. *Jones* (1), where discovery was granted in order to shew what the nature of the acts of misconduct were which were relied upon by the person refusing to give discovery. As this is the case, it does come to what has been stated by Lord Justice *James*, as being simply a desire to know what evidence will be given by the Plaintiffs in support of their statements, and of the acts which they allege make out their case. It may be very convenient for the defence to have such discovery, and it may enable the Defendants to prepare for trial with less apprehension and with less expense, but the question which we have to consider is whether they are entitled, as a matter of right, to discovery from the

(1) 7 Ch. D. 435.

C. A. 1880 BENBOW v. LOW.

opposing party, and however much it would save them trouble and expense, in my opinion they are not, because they come within the principle that you are not entitled to see what evidence your opponent is prepared to give in support of his own case.

Solicitors: *C. E. Withall; Lucas & Sons.*

C. A. 1880 Nov. 4.

WARNER *v.* MOSSES.

[1879 W. 243.]

Practice—Agreement to take Evidence by Affidavit—Examination of Witnesses de bene esse—Rules of Court, 1875, *Order* XXXVII., *r.* 4; *Order* XXXVIII.

25 Ch D 23-7

Where the parties to an action agree under Order XXXVIII. to take the evidence in the action by affidavit, and either party subsequently finds himself unable to procure affidavit evidence either by reason of the reluctance or some of his witnesses to make affidavits or other good cause, his proper course is to take out a summons for leave to be relieved from the agreement, and the Court will, in a proper case, make an order that the reluctant witnesses be examined *vivâ voce* at the trial, or, at the option of the other party, discharge the agreement and direct all the evidence to be taken *vivâ voce* at the trial.

Whenever a necessary witness is going abroad, or is from illness, age, or other infirmity likely to be unable to attend the trial, an order will be made under Order XXXVII., rule 4, for his examination before an officer of the Court in the presence of both parties.

A like order will be made whenever it shall appear to the Court necessary for the purposes of justice.

APPEAL from a decision of Vice-Chancellor *Bacon* in Chambers.

In this action an agreement was come to between the parties to take evidence in the action by affidavit, but after the agreement the Plaintiff's solicitor ascertained that several witnesses whose evidence was most material to support the Plaintiff's case declined to make affidavits.

Accordingly on the 30th of July, 1880, the Plaintiff obtained an order in Chambers that he should be at liberty to examine witnesses *ex parte* upon oath touching the matters in question in the action, and the only way in which their evidence could be taken was by summoning them before an examiner.

The Defendant appealed.

S. Dickinson, for the Appellant :—

The Plaintiff is bound by the agreement to take the evidence by affidavit. If he cannot get his evidence in that way, he should take out a summons to be relieved from the agreement. At any rate, he is not entitled to examine unwilling witnesses *ex parte* and then to use or reject their evidence as he thinks fit: *Smith* v. *Baker* (1).

Sir *H. Jackson*, Q.C., and *G. Woods*, for the Respondent :—

The Vice-Chancellor had abundant jurisdiction to make this order, and under the circumstances he was justified in making it: Order XXXVII., r. 4; *Judicature Act*, 1875, s. 24.

[JESSEL, M.R. :—The true meaning of Order XXXVII., rule 4, is that stated in the note to the rule in Mr. *Wilson's* book (2).]

Under the old Chancery practice this order could have been obtained, and it is only superseded by the new procedure, if at all, by implication. Possibly the order should have stated the names of the witnesses, but that we are quite willing to give.

JESSEL, M.R. :—

In this particular case it appears to me that there was no jurisdiction to make the order, and even if there had been jurisdiction to make it, I should still have been of opinion that the order could not be maintained.

In the first place it must be recollected that under Order XXXVII., rule 1, evidence in every action is to be given by witnesses examined *vivâ voce* in open court. The only exceptions are those mentioned in the 4th rule of the same Order, and where, under Order XXXVIII., by consent of the parties, the evidence is to be taken by affidavit. In this case there has been consent to take evidence by affidavit, and consequently in no other way can the evidence be taken for this trial. If, however, it should appear that one of the parties has given the consent by mistake, there is a mode by which that party can be released from the consequence of that mistake.

I have had several cases before me in which application has

(1) 4 N. R. 321. (2) Page 269.

C. A. 1880 WARNER v. MOSSES. Jessel, M.R.

been made to be released from the consequences of such a mistake. The solicitor in those cases made an affidavit somewhat to this effect: that at the time he gave the consent to take the evidence by affidavit, he believed his witnesses would make affidavits; he has since ascertained to his surprise, on application, that one or more of the witnesses whom he had expected to make affidavits, and whose names and addresses he gave, were reluctant to make affidavits, and refused to do so; and he therefore applied that those witnesses might be examined *vivâ voce* at the trial, or, at the option of the other party, that the agreement should be put an end to and all the witnesses should be examined *vivâ voce* at the trial; and if those facts were made out, then, under the general jurisdiction of the Court to relieve from a slip or mistake in practice, I have made such an order, giving the other side the option of having all the witnesses examined at the trial, or only those who refused to make the affidavits. But in the present instance there was no such application. The agreement stands, and is binding on the other side to get affidavits from these witnesses, and yet an order has been made allowing the Plaintiff to examine any witnesses he pleases (including therefore the Defendant's witnesses) *ex parte* before any examiner of his own choosing.

The 4th rule is this: "The Court or Judge may in a cause or matter, when it shall appear necessary for the purpose of justice, make any order for the examination upon oath before any officer of the Court or any other person or persons at any place of any witness or person, and may order any deposition so taken to be filed in the Court, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct."

That is general in its terms, but in regard to the provisions of an Act of Parliament one must recollect what the practice was it was intended to meet.

I do not intend to cut down the generality of its terms, but it is confined to cases in which it appears "necessary for the purposes of justice." Now it cannot be necessary for the purposes of justice to examine witnesses before the trial who can attend at the trial, and accordingly this rule of the Order has been used in the cases

mentioned in Mr. *Wilson's* book, where witnesses are going abroad, or who from age or illness or other infirmity are likely to be unable to attend the trial, and then they are examined *de bene esse* in the usual way; but to have such an order you must have evidence that the witness cannot attend the trial. I do not wish to confine the effect of this rule to the cases I have mentioned. It does extend, no doubt, as it says, to all cases where it shall appear "necessary for the purposes of justice."

Now, having said this much, I am not aware of any case where it can be necessary for the purposes of justice that witnesses should be examined *ex parte*. I do not say such a case cannot arise, but as a general rule a witness should not be examined *ex parte*. The practice under the rule is that the witness examined *de bene esse* is examined by both parties. There might be a case—a case of imminent danger of death—in which leave might be given to either party to attend, and therefore it would not be absolutely necessary that both parties should attend, but it must be shewn to be necessary for the purposes of justice. But if there were power to make this order, I still think it should not have been made *ex parte*.

There is another objection to the order. It should state the names of the witnesses to be examined, but it allows the Plaintiff to examine any witness he pleases, and subpœna every one of the Defendant's witnesses, and examine them accordingly. Of course no such power should be given to either side. If the learned Judge's attention had been called to the possible effect of the order, he would not have made it in that shape.

I think the right course is simply to discharge the order with costs, but without prejudice to any application which the Plaintiff may make as to the mode of giving evidence at the trial.

JAMES and COTTON, L.JJ., concurred.

Solicitors for Appellant: *Janson, Cobb, & Pearson.*
Solicitor for Respondent: *J. W. Sykes.*

C. A.
1880
Nov. 18.

Ex parte NATIONAL MERCANTILE BANK.
In re PHILLIPS.

Bill of Sale—Registration—"Growing Crops"—Severance—Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 7.

Though a bill of sale under the *Bills of Sale Act*, 1854, does not require registration in respect of growing crops, yet when the crops are subsequently severed by the grantor they become personal chattels, and, if possession has not been taken of them by the grantee before the commencement of the bankruptcy of the grantor, they will pass to the trustee in the bankruptcy.

Brantom v. *Griffits* (1) distinguished.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

On the 23rd of December, 1878, *T. R. Phillips*, a farmer in *Surrey*, and a wine merchant in the city of *London*, executed a bill of sale to the *National Mercantile Bank* to secure the payment of £575. By the deed he assigned to the bank the furniture, live and dead farm stock, growing crops, utensils and implements of husbandry, and future growing crops, and other goods, chattels, and effects of and belonging to the mortgagor being in and about the dwelling-house and farms, land and premises of the mortgagor therein mentioned, together with all his tenant right and interest then yet to come and unexpired in and to the said farms, lands and premises. The deed contained (*inter alia*) a covenant by the mortgagor that he would not remove or permit or suffer to be removed the said goods, chattels and effects, or any of them, from the said dwelling-house and premises without the previous consent in writing of the mortgagees. The deed was never registered.

On the 21st of October, 1879, *Phillips* filed a liquidation petition. At this time nearly the whole of the crops which had been growing on the farms when the bill of sale was executed, or which had been since planted, had been severed, and were stacked on the land. The bank did not take possession under their bill of sale until the 22nd of November, 1879. The Registrar held that, as

(1) 1 C. P. D. 349; 2 C. P. D. 212.

the bill of sale had not been registered, the severed crops passed to the trustee in the liquidation.

The bank appealed.

Winslow, Q.C., and *Robson*, for the Appellants:—

Growing crops are not "personal chattels" within the *Bills of Sale Act*, 1854, and registration is not necessary as to them: *Brantom* v. *Griffits* (1). The security, being thus good in its inception, cannot be vitiated by the subsequent severance of the crops.

[JESSEL, M.R.:—Is not the real meaning of the deed this—that the farmer shall carry on his business in the ordinary way? Does it not mean that you are to have the crops so long as they are growing?]

Brantom v. *Griffits* shews that the question is what are chattels at the time of the the execution of the bill of sale. Mr. Justice *Brett* said (2) (after referring to the definition of apparent possession in sect. 7 of the Act), "It was argued that these words as to personal enjoyment, taken together with the expression 'capable of complete transfer by delivery,' shew that the Act only applies to things which, at the moment when the bill of sale is given and the provisions of the Act are to be applied to it, might be delivered to the assignee, and are not, but are left in the enjoyment of the assignor; and that it follows that, as growing crops are not capable of being used or enjoyed or of being delivered at the time when the provisions of the Act are said to apply to them, they are not personal chattels within its meaning. Independently of authority I agree with that argument." His Lordship went on to say that there was a decision of the Irish Court of Common Pleas, in *Sheridan* v. *McCartney* (3), to the contrary, but he stated reasons why he could not follow that decision.

[JESSEL, M.R.:—Suppose the assignment had been of crops then growing and future growing crops in substitution for them, could you have taken the severed crops then?]

Yes. The property having once passed to us, it could not be afterwards divested.

(1) 1 C. P. D. 349; 2 C. P. D. 212. (2) 1 C. P. D. 354.
(3) 11 Ir. C. L. (N.S.) 506.

C. A. 1880

Ex parte NATIONAL MERCANTILE BANK. *In re* PHILLIPS.

[JESSEL, M.R.:—In the case of an ordinary mortgage of land was it ever heard of that the mortgagee could take the crops when severed by the mortgagor who had remained in possession?]

An alteration in the character of the property after the execution of the deed cannot alter the rights of the mortgagee. And the grantor has covenanted not to remove the crops off the farm.

[JAMES, L.J.:—It is quite clear that if an assignment were made of growing crops if and when they shall be severed, it would be void if unregistered.]

In *Ex parte Payne* (1) it was held that the property in growing crops passed by a bill of sale.

[JESSEL, M.R.:—Property of this kind does not pass absolutely to a mortgagee. If a mortgage includes timber trees, the mortgagor while he remains in possession is entitled to cut them down and sell them.]

Hemming, Q.C., and *E. Cooper Willis*, for the trustee, were not heard.

JESSEL, M.R.:—

I am of opinion that the decision of the Registrar was quite right. The growing crops were an interest in land, and they passed by the deed, which, so far as they were concerned, did not require registration under the Act. By the ordinary law the rents and profits of land in mortgage belong to the mortgagor so long as he is allowed to remain in possession, and therefore in this case the grantor was entitled to sever the crops, which, when severed, became chattels under the deed, and therefore subject to the provisions of the *Bills of Sale Act*. It is said that the deed contains a bargain by the grantor not to remove them off the land. But that being a bargain relating to chattels is void as against the trustee by reason of the non-registration of the deed.

JAMES and LUSH, L.JJ., concurred.

Solicitor for Appellants: *J. I. Irving.*
Solicitors for Trustee: *May, Sykes, & Batten.*

(1) 11 Ch. D. 539.

Ex parte SHEARD. *In re* POOLEY (No. 1).

C. A.
1880
Nov. 18.

Removal of Trustee in Bankruptcy—Judicial Discretion—Bankruptcy Act, 1869, (32 & 33 *Vict. c.* 71), *s.* 83, *sub-s.* 4.

A trustee in bankruptcy can be removed by the Court from his office under sect. 83, sub-sect. 4, of the *Bankruptcy Act*, 1869, only upon good cause shewn, not at the mere discretion of the Registrar.

But, in making an order for the removal of a trustee for good cause, the Registrar is exercising a judicial discretion, and if he has exercised his discretion according to law, the Court of Appeal will not disturb his order.

THIS was an appeal from an order made by Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy, removing *A. A. Sheard* from the office of trustee in the bankruptcy of *A. G. Pooley*.

Sheard was employed as a clerk, at a salary of £2 5*s.* a week, to keep the books in the office of a newspaper called the *Brewers' Guardian*, of which *Thomas Pooley*, a son of the bankrupt, was the editor. He consented to act as trustee at the request of *Thomas Pooley*, who was not a creditor of the bankrupt.

At the meeting of the creditors in December, 1879, at which he was chosen as trustee, *Sheard* was asked by the solicitor's clerk, whose duty it was to put the resolution into writing, how he was to be described, and he said that as he kept accounts he had better be described as an accountant. He was accordingly described in the resolution as "of No. 1, *Northway Road, Loughborough Park, Brixton*, in the county of *Surrey*, Accountant," the address given being his private residence. The office of the *Brewers' Guardian* was in *Walbrook*, in the city of *London*.

The application for *Sheard's* removal was made on the 16th of March, 1880, by two of the creditors, and it was based upon the allegations that he was not a fit person to fill the office; that he had misconducted himself in his office; that he was in an interest adverse to that of the general body of creditors; and that his appointment was procured by fraud and misrepresentation.

The application was supported by a creditor for a large amount who had voted in favour of *Sheard's* appointment and who deposed that he knew nothing then about *Sheard* except from the

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Ex parte SHEARD. *In re* POOLEY (No. 1).

description which was given of him in the resolution, and that if he had then known what he had since discovered he should not have voted for him.

The Registrar was of opinion that *Sheard* had allowed himself to be described by a wrong name; that he was not a fit person to be trustee; and that he had taken no proper steps to examine the bankrupt or to get in his assets. He therefore made the order of removal, and directed that *Sheard* should pay the costs of the proceedings.

Sheard appealed.

Winslow, Q.C., and *Northmore Lawrence*, for the Appellant:—

Under sub-sect. 4 of sect. 83 (1) the creditors can remove the trustee at their pleasure, but the Court can remove him only "on cause shewn." Some misconduct must be proved. In *In re Sir John Moore Gold Company* (2) it was held that in order to justify the removal of a liquidator under sect. 141 of the *Companies Act*, 1862, some unfitness must be shewn, though, no doubt, the words in that section are "on due cause shewn."

[JESSEL, M.R.:—It is the same thing.]

The allegations of misconduct which are made have not been established. At any rate, it is not a good ground of removal that the Appellant was described as an accountant. If the creditors in appointing him acted under a mistake, they have power to remove him; the misdescription does not render him unfit to be trustee. In any event the Appellant ought not to be ordered to pay the costs of the proceedings for his removal.

De Gex, Q.C., and *Pollard*, for the creditors who obtained the order of removal, were not heard.

JESSEL, M.R.:—

Questions of this kind are all matters of discretion, though it is

(1) Sect. 83, sub-sect. 4: "The Court may, upon cause shewn, remove any trustee. The creditors may, by special resolution at a meeting specially called for that purpose, of which seven days' notice has been given, remove the trustee and appoint another person to fill his office."

(2) 12 Ch. D. 325.

a discretion which is to be exercised according to law. The Court of Appeal will not interfere with the exercise of the discretion by the Registrar, if it has been exercised according to law, merely because there may be more or less proved against the man who has been removed. I agree that the removal must not be at the mere discretion of the Registrar, but that it must be for good cause shewn. Here, however, the Registrar has come to the conclusion that sufficient cause has been shewn. No doubt this conclusion is to a great extent founded upon inference from the facts proved. But what we have to consider is whether the inference was fairly drawn. It appears that the trustee was a clerk at a weekly salary of 45*s.*, in the office of a newspaper of which the bankrupt's son was the editor, and that he was requested by the son to act as trustee. The Registrar has inferred, and I am not prepared to say that it is not a fair inference, that he was a mere tool of the bankrupt. Again, he was described as an accountant, which he is not. It is a misdescription, and whether it was a fraudulent misdescription or not, it must have been adopted for a purpose. As to the alleged delay in the administration of the estate, the Registrar knows perfectly well how the proceedings have been conducted. It is not a question whether any particular proceeding has been conducted rightly or wrongly, but the whole course of the proceedings must be looked at. Seeing then that cause was shewn for the removal, I think the right course is to affirm the decision of the Registrar, and to dismiss the appeal with costs.

JAMES, and LUSH, L.JJ. concurred.

Solicitors for Appellant: *Harper, Broad, & Battcock.*
Solicitor for Creditors: *John Andrews.*

C. A.
1880
Nov. 18;
Dec. 2.

Ex parte SHEARD. *In re* POOLEY (No. 2).

Appeal—Locus Standi—Appeal by Trustee in Bankruptcy—Removal of Trustee before Hearing—Refusal of New Trustee to prosecute Appeal—Costs.

The trustee in a bankruptcy presented an appeal against the admission of a proof. Before the appeal came on for hearing the Appellant had been removed from his office, and a new trustee appointed, who declined to prosecute the appeal:—

Held, that the Appellant had no *locus standi*, but that the appeal must stand over for a fortnight to give the creditors an opportunity of prosecuting it.

At the end of the fortnight no creditor had adopted the appeal:—

Held, that the appeal must be dismissed, and that the Respondent was entitled to have his costs paid out of the deposit, but that no personal order for costs could be made against the Appellant.

THIS was an appeal from an order made by Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy, admitting a proof tendered by *Sidney Toppin* in the bankruptcy of *A. G. Pooley*.

The notice of appeal was given on the 2nd of April, 1880, by *A. A. Sheard*, who was then the trustee of the bankrupt's estate. On the 21st of April, 1880, *Sheard* was, by the order of the Court, removed from his office, and on the 5th of May, 1880, *W. L. Holt* was appointed trustee in his place. The appeal of *Sheard* came on for hearing on the 18th of November, 1880. *Holt* had not adopted the appeal.

Winslow, Q.C., and *Northmore Lawrence*, for the Appellant.

De Gex, Q.C., and *Romer*, for *Toppin*, objected that the Appellant had now no *locus standi*.

Winslow, Q.C., suggested that some of the creditors might possibly desire to prosecute the appeal.

THE COURT (*Jessel*, M.R., and *James* and *Lush*, L.JJ.) ordered the appeal to stand over for a fortnight, in order to give the creditors an opportunity of prosecuting it.

Dec. 2. The appeal stood in the paper again. No creditor had adopted it.

De Gex, Q.C., and *Romer*, for the Respondent, asked for a personal order against the Appellant dismissing the appeal with costs.

Winslow, Q.C., and *Northmore Lawrence*, for the Appellant:—

The appeal was presented under the direction of the committee of inspection. It is no fault of the Appellant that he has now lost his official character. The Court cannot determine the question of costs without hearing the appeal on its merits, and it will not do that. The appeal simply drops. There cannot be any order for costs until there is a judgment. It was the Respondent himself who took the objection as to *locus standi*.

De Gex, Q.C., and *Romer*, for the Respondent:—

The contest is between the Respondent and the general body of the creditors. Their former representative opposed the admission of his proof and brought the appeal, and their present representative is of a different mind. Before presenting an appeal a trustee ought to see that there are sufficient assets to provide for his costs, or to obtain an indemnity from the creditors. The Respondent, who is now admitted to be in the right, ought not to lose his costs. The appeal was brought either rightly or wrongly. If rightly, the Appellant will be entitled to have his costs out of the assets; if wrongly, he ought not to have any costs. At any rate, the Respondent ought to have his costs to the extent of the deposit.

JAMES, L.J.:—

I think that the Respondent is entitled to an order for the payment of his costs out of the deposit. It may be his misfortune, or it may be a benefit to him, that we cannot now decide the question whether the Appellant was right in presenting the appeal. The new trustee has taken a different view of the case. But, to the extent to which we have the assets before us, I think we may give the Respondent his costs. It may be assumed that the creditors, by their agent, presented the appeal. They afterwards

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appointed a new agent, and, acting by him, they determined not to prosecute the appeal. The deposit on the appeal may be taken to have been made out of the creditors' money, and, so far as it will extend, we may order the Respondent's costs to be paid. But I do not see my way to make the Appellant personally liable for costs when we do not allow him to argue the appeal. In fact he is not allowed by the Respondent himself to do so.

COTTON and LUSH, L.JJ., concurred.

Solicitors for Appellant: *Harper, Broad, & Battcock.*
Solicitor for Respondent: *S. Toppin.*

C. A. 1880 *Nov.* 20.

In re DUKE. HANNAH *v.* DUKE.

[1877 D. 189.]

Will—Construction—Vested Interest—Erroneous Reference.

A testator gave the interest arising from a sum of stock to *V. D.*, which interest he was to enjoy along with his wife, *M. D.*, during their respective lives, but in the event of either dying and the survivor marrying again, then the capital to be divided, share and share alike, between their children; an arrangement ultimately to take place at the death of their parents, should neither marry again. The testator then directed that the money should not be removed from the English funds during the lifetime of *V. D.* and *M. D.*, nor until the period arrived "for its distribution (after their death) among their children surviving, share and share alike":—

Held (affirming the decision of *Jessel*, M.R.), that the interests of the children were not contingent on their surviving their parents, the concluding words not being sufficient to render the previously vested gift contingent.

SIR *VALENTINE DUKE*, by will dated the 1st of January, 1855, bequeathed to his nephew, *Valentine Duke*, the interest arising from £10,000 New £3 per Cent. Bank Annuities, "which interest he is to enjoy together with his wife, *Maria Duke*, during their respective lives, but in the event of either dying and that the survivor should again marry, then the before-mentioned sum to be divided share and share alike between their children, each

to have their portion as he or she shall become of age; an arrangement ultimately to take place at the death of their parents, should neither marry again. I direct that this money shall not be removed from the English funds during the lifetime of my before-mentioned nephew *V. Duke* and his wife, my niece *Maria Duke*, nor until the period arrives for its distribution (after their death) among their children surviving share and share alike."

The will contained other gifts in very similar terms, but with differences in the words of gift which made it clear that, as to those legacies, vesting was postponed till the period of distribution.

The testator died in November, 1858.

V. Duke, the nephew, died in 1870, having had by his wife *Maria* nine children, one of whom died in the life of the testator, but the other eight survived him. *Robert Rawson Duke* died intestate on the 14th of November, 1876, having attained the age of twenty-one years. *Maria Duke*, the widow of *V. Duke* the nephew, was still living.

An order having been made for the administration of the personal estate of *Robert Rawson Duke*, a subsequent order was made to sell his reversionary interest in the legacy, and it was sold accordingly. The purchaser applied to be discharged from his purchase, on the ground that the concluding words of the bequest confined it to children living at the period of distribution. The application was refused by *Jessel*, M.R., and the purchasers appealed.

Clare, for the purchasers:—

Where there is no gift but in a direction to pay, vesting is *primâ facie* postponed to the time appointed for payment: *Leake* v. *Robinson* (1). The application of this rule is excluded when the postponement is until the determination of a prior interest, the postponement being then considered as made only "for the convenience of the estate." So, but for the final words, the shares would have vested at once. The concluding direction, however, shews an intention that the division should only be among

(1) 2 Mer. 363.

C. A. 1880 — *In re* DUKE. HANNAH *v.* DUKE.

children living at the period of distribution, and that, I submit, is enough to control the indication of intention furnished by the insertion of the life estate. This view is fortified by the gifts of the other legacies, which shew that the testator's general intention was that only children who survived their parents should take.

Jolliffe, contrà, was not called upon.

JAMES, L.J.:—

I cannot differ from the conclusion of the Master of the Rolls in this case. We have, in the first place, words of gift which, taken alone, would clearly confer immediately vested interests on all the children. Now, there is a strong, or I may say a stringent, rule, that if we have words clearly making a vested gift, clear words are required to convert it into a contingent one. I do not think that the words occurring at the close of the direction that the investment is not to be varied are sufficient to control the effect of the previous clear disposition. It would not be according to sound rules of construction to refer to the other gifts in the will as varying the effect of the gift before us. The testator may have had a different intention as to a different class of legatees.

COTTON, L.J.:—

I agree; and should not think it necessary to add anything; but, for the satisfaction of the purchasers, it is better that I should state my reasons. We have, in the first place, a disposition which, standing alone, would clearly give immediately vested interests to all the children. Then it is said that the subsequent part of the will modifies this, and gives a dictionary requiring us to construe the limitations in a different way. But the words relied on occur in a mere direction as to keeping the fund in its actual state of investment, and cannot be looked to for the purpose of modifying the previous gift. The clause amounts only to a direction that the fund is not to be disturbed till the period of distribution, with an erroneous reference to the way in which it is then to be disposed of. As to the gifts of the other legacies, the difference of language indicates a difference of

intention. In the latter gifts the testator uses words of contingency, in the present gift he does not, and it is not right to refer to the latter gifts for the purpose of shewing that the testator intended the present gift to be contingent. The inference is rather the other way—that when the testator intended a gift to be contingent he used words of contingency.

LUSH, L.J., concurred.

Solicitors: *Rhodes & Son; Burton, Yeates, & Hart.*

In re HOLT.

Infants Custody Act, 1873 (36 & 37 *Vict. c.* 12), *s.* 1—*Order for Custody of Infant "until further order"—Subsequent Application to vary—Appeal.*

When an order is made under sect. 1 of the *Infants Custody Act*, 1873, on the petition of a mother, giving the custody of an infant child to her "until further order," an application to vary the order by reason of something subsequent to its date should be made, not by way of appeal, but by motion before the Judge of first instance.

Such a motion can be made by the respondent to the original petition.

The provision of sect. 1 of the Act, that the application shall be made by the mother by her next friend, applies only to the original petition.

ON the 16th of May, 1878, a petition was presented under the *Infants Custody Act*, 1873 (36 & 37 Vict. c. 12), by *Hannah Holt* (the wife of *Charles Herbert Holt*), praying that he might be ordered to deliver her infant child, *Florence Elizabeth Holt*, then about two years of age, into her custody until the child should attain the age of sixteen years, subject to such regulations as the Court should deem convenient and just. On the 15th of May leave had been given to the petitioner to present the petition *in formâ pauperis*, and without a next friend. On the 28th of June, 1878, an order was made by Vice-Chancellor *Malins* that the infant should be delivered into the petitioner's custody, until she should attain sixteen or further order. On the 4th of November, 1880, the husband moved before the Vice-Chancellor that this order might be discharged, and the motion was refused with costs. On the 17th of November the husband gave notice of a motion in the

C. A. 1880 *In re* Holt.

Court of Appeal that he might be at liberty to appeal against the order of the 28th of June, 1878, notwithstanding that the time limited by the General Orders for so appealing had expired.

W. Renshaw, for the motion :—

There are reasons now which render it improper that the mother should have the custody of the infant.

Jessel, M.R. :—

Why should you appeal from the original order? It is only "until further order." If something has since happened to render it an improper order, you can move before the Vice-Chancellor to vary it. It is like an order for an injunction until further order; the Defendant can at any time move to vary it.

W. Renshaw :—Sect. 1 of the Act provides that the Court may act upon the petition, by her next friend, of the mother of the infant.

Jessel, M.R. :—That only applies to the original application.

Cotton and Lush, L.JJ., concurred.

Freeman, for the mother:—The motion will be refused with costs.

Jessel, M.R. :—The Vice-Chancellor will deal with the costs. The applicant undertakes to move before the Vice-Chancellor.

Solicitors for the father : *Shaw & Tremellen.*
Solicitors for the mother; *Makinson & Carpenter.*

In re RAGGETT. *Ex parte* WILLIAMS.

C. A. 1880 Nov. 25.

Mortgage—Consolidation—One Mortgage ceasing to exist — Mortgage in the Name of Trustees.

Two persons partners in a mercantile firm, who held a leasehold house, made an equitable mortgage of it to *W.* Afterwards the firm took in another partner who acquired a share in the equity of redemption. The firm then mortgaged their interest in another house, which they held as joint tenants, to *W.* for a further debt. The firm having become bankrupt, the lease on the first-mentioned house was determined by the bankruptcy, and the lessor re-entered. *W.* claimed to consolidate both debts, so that the second-mentioned house should not be redeemed without paying both debts:—

Held, that one mortgaged property having ceased to exist, there could be no consolidation of the two debts.

Whether a mortgage by three persons can be consolidated with a mortgage by two in trust for the three, *quære*.

By an indenture dated the 7th of April, 1877, *F. G. Raggett* and *W. F. Williams* covenanted with *W. J. Williams* to assign to him a leasehold house in the city of *London* for securing the repayment of £500 advanced by him to them.

Shortly after the date of this deed *Raggett* and *W. F. Williams* took *E. Beadon* into partnership, and the leasehold house, subject to the equitable mortgage, became part of the partnership property.

By an indenture dated the 22nd of November, 1877, Count *Alvo* assigned a leasehold house in *Mansfield Street, Portland Place*, with the furniture therein, to *E. Beadon*, as a trustee for himself and his partners, *F. G. Raggett* and *W. F. Williams*, by way of mortgage, for securing the repayment of a considerable sum of money. A suit was afterwards instituted for the purpose of ascertaining the amount really due to the mortgagees on their security, and the greater part was paid off, leaving about £750 still due to them.

By an indenture dated the 21st of March, 1879, the firm assigned the sum then due from Count *Alvo*, and the securities for the same, to *W. J. Williams*, for securing the repayment of £200 advanced to them, and notice of the assignment was served on Count *Alvo*.

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The three partners, *Raggett*, *W. F. Williams*, and *Beadon*, were afterwards adjudicated bankrupt.

The lease under which the house in the city of *London* was held contained a proviso for forfeiture and re-entry on the bankruptcy of the lessees. The landlord entered in pursuance of this proviso, and put an end to the lease.

Under these circumstances *W. J. Williams* claimed to consolidate his two mortgage debts of £200 and £500, so that the mortgage on the house in *Mansfield Street* should not be redeemed without paying off both sums with interest.

Mr. Registrar *Pepys*, sitting for the Chief Judge, rejected the claim, and ordered the debt charged on Count *Alvo's* house to be alone paid.

W. J. Williams appealed from this decision.

Romer, for the Appellant:—

The mortgagee is entitled to consolidate the two mortgages in this case. Both debts are charged on the mortgagor's real estate, and the fact that one part of the estate has been lost since makes no difference. It has often been held that the comparative value of the estates cannot be taken into account, and on the same principle, the total loss of one cannot prejudice the mortgagee's existing rights over the other: *Selby* v. *Pomfret* (1); *Barrow* v. *Manning* (before Vice-Chancellor *Hall* on June 4, 1880).

With respect to the second objection, namely, that the parties to the two mortgages are different; the difference is only formal, for the real mortgagees in both cases were the three partners, and the fact that one of the mortgages was taken in the names of two of them who afterwards held in trust for the three, cannot make any difference as to the rights of the parties: *Beevor* v. *Luck* (2); *Tassell* v. *Smith* (3).

Winslow, Q.C., and *G. W. Lawrance*, for the trustees, were not called on.

JAMES, L.J.:—

We are all of opinion that the decision of the Registrar in this

(1) 1 J. & H. 336. (2) Law Rep. 4 Eq. 537.
(3) 2 De G. & J. 713.

case must be affirmed. Speaking for myself, I am bound to say that, having had frequent occasion to consider cases of consolidation of mortgages, and observing that sometimes injustice is done to the parties, I am not disposed to extend the doctrine to any case which I do not find already covered by some authority, or logically deducible from what has been laid down by some authority. And I do not find any authority at all for deciding that there can be any consolidation between two mortgage debts where one of the estates mortgaged has ceased to exist. It is not correct to call it consolidation in such a case; it is an attempt to tack one debt which has once been a mortgage debt to another security. It is not suggested that this debt could have been tacked independently of the question of consolidation. That really disposes of the question, and it is the view which was taken of it by the Registrar. With respect to the case of *Barrow* v. *Manning*, before Vice-Chancellor *Hall*, we have not the full facts of the case before us; but if that decision is inconsistent with our present decision, I do not see how it can be supported.

As to the second point, I know no authority or principle upon which a mortgagee can consolidate a mortgage by three persons with one by two in trust for the three; there being no reference to the first transaction in the second, and no privity between the mortgagor and the *cestuis que trust.* Mr. *Romer* suggested that the *cestuis que trust* in the mortgage of property held upon trust could have called on the trustees to have conveyed the estate to them; but it appears to me that a mortgagee has no right to look into any transactions between the mortgagor and third parties. But the first ground is sufficient for the dismissal of the appeal.

COTTON, L.J.:—

I am also of opinion that on the ground taken by the Registrar this appeal ought to be dismissed. What is consolidation? It is when a mortgagor comes into a Court of Equity to redeem his property, and the Court says, "You shall not do this if the mortgagee has another debt due from you which is secured upon an insufficient security. You must pay both debts; if not, you cannot redeem either property." But this assumes the right of the mortgagee to hold both properties, and the power of the mort-

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gagor to redeem both when both of the debts are paid. It does not apply to cases where there is only one property in the hands of the mortgagee.

This is an attempt to make one property liable to two debts. The mortgagee's right is only to retain both properties so long as he is able to reconvey both to the mortgagor, and if he voluntarily parts with one his right ceases. As this is so, we cannot deal with the case as if, to use Vice-Chancellor *Wood's* expression in *Selby* v. *Pomfret* (1), "both estates were pledged for the whole amount." That can only be when both properties remain in specie in the same mortgagee.

Mr. *Romer* said that the Court never considers the relative value of the properties; but there is a broad distinction between a property of very small value and one which has ceased to exist at all. One can be handed over to the mortgagor and the other cannot. I think, therefore, that on the first ground the decision must be affirmed.

As to the second point, if it had been necessary to decide it I should have required time to consider it.

LUSH, L.J.:—

I am also of opinion that the Registrar was right in holding that when one security has ceased to exist the right to consolidation is gone.

Solicitors: *Lawrance, Plews, & Baker; Aldridge.*

(1) 1 J. & H. 336.

SEEAR *v.* LAWSON.

C. A.
1880
V.-C. B.
Nov. 5.
C. A.
Dec. 1.

[1880 S. 100.]

Practice—Assignment of Cause of Action—Amendment of Title of Action and of Pleadings—Rules of Court, 1875, *Order* XVI., *r.* 13.

A trustee in bankruptcy commenced an action to obtain a declaration that a deed, which purported to be an absolute conveyance of real estate by the bankrupt, was in fact a mortgage, and to redeem such mortgage; and subsequently sold and assigned his interest in the subject-matter of the action to *C.*, who claimed to carry on the action in the name of the original Plaintiff:—

Held, on the application of the Defendant, that *C.* was bound to amend the title of the action so as to shew that he was the real Plaintiff, and to introduce such averments in the statement of claim as would disclose his title.

APPEAL from the decision of Vice-Chancellor *Bacon*.

The Plaintiff in the original action of *Seear* v. *Lawson* was a trustee in bankruptcy, and claimed a declaration that a conveyance of real estate by the bankrupt to the Defendant *Lawson* was in fact, not an absolute conveyance, but a mortgage; and also claimed to redeem the alleged mortgage.

On the 23rd of April, 1880, one *W. H. Chatterton*, having purchased all the interest of the trustee in bankruptcy in the subject-matter of the action, obtained an order entitled in *Seear* v. *Lawson* only, giving him liberty to carry on and prosecute the action and the proceedings therein in like manner as the same might have been carried on and prosecuted by the Plaintiff if he had not assigned his interest as aforesaid (1).

W. H. Chatterton then delivered a statement of claim entitled in *Seear* v. *Lawson* only, and without containing any averments disclosing his title as purchaser.

The Defendant thereupon took out a summons, which was adjourned into Court, to compel *Chatterton* to amend the title of the action and the statement of claim, so as to shew that he was the real Plaintiff. The summons was heard before Vice-Chancellor *Bacon* on the 5th of November, 1880.

(1) See *Seear* v. *Lawson*, 15 Ch. D. 426.

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Sir *H. Jackson*, Q.C., and *G. Woods*, for the summons.

Winslow, Q.C., and *Terrell*, for *Chatterton*.

BACON, V.C.:—

I can make no such order as this summons asks for. The law is plain on the statute. Mr. *Chatterton* has obtained an order giving him liberty "to carry on this action of *Seear* v. *Lawson* and the proceedings therein in like manner as the same might have been carried on and prosecuted by the Plaintiff." I cannot say that Mr. *Chatterton*, who has acquired the interest of the trustee in the manner which has been stated, is not at liberty to do that which the Court has said he may do, viz., carry on the action in the name of *Seear*. What right has the Defendant to pick out his Plaintiff? What right has he to say to *Chatterton*, "Since you have bought Mr. *Seear's* interest, that and nothing more, I insist on your being named as a Plaintiff in this action." Mr. *Chatterton* does not desire to be named as Plaintiff. It is *Seear's* interest alone that he can recover, if he succeeds. The notion that Mr. *Chatterton* was wanted as a Plaintiff in order that the Defendant may file a counter-claim has nothing whatever to do with it. It rather cuts the other way. If there is any ground for a counter-claim that is a reason for filing a separate claim against Mr. *Chatterton* wholly independent of anything Mr. *Seear* would have to do with it. Mr. *Chatterton* has bought the right of using Mr. *Seear's* name in carrying on this action, that is all that he has done, and yet the Defendant insists on having Mr. *Chatterton's* name as Plaintiff inserted in the record. In my opinion the record is perfectly right, and there is no ground whatever for the summons.

C. A.

The Defendant appealed. The appeal was heard on the 1st of December.

Sir *H. Jackson*, Q.C., and *G. Woods*, for the Appellant:—

The order of the 23rd of April was equivalent to the old supplemental order, or order of revivor, under which a statement was added to the title of the original action, so as to shew who

were the real Plaintiffs. If *Seear's* name alone remains in the title as Plaintiff, we are fighting a nominal Plaintiff. We submit we are entitled to have the real litigant before the Court, so that we may have the benefit of a defence against *Chatterton*. This is a redemption action. If we get a foreclosure decree against *Seear*, how will that benefit us?

Higgins, Q.C., *Winslow*, Q.C., and *Terrell*, for the Respondent:—

Assuming that the order is equivalent to a supplemental order under the old practice, that practice is overruled by the new practice under the *Judicature Act*, Order XVI., rule 13; and the order obtained by *Chatterton* is equivalent to a power of attorney, which enables him to carry on the action in the name of *Seear*.

JESSEL, M.R.:—

This is a summons asking practically (and it has been so treated in argument) that the pleadings may be properly amended. That being so, it is necessary to consider what the proceedings were. Mr. *Seear*, as trustee of a bankrupt, claimed to redeem what he alleged was a mortgage, that is, he alleged that that which purported to be a sale out and out was really a mortgage. He sold his rights to Mr. *Chatterton*. Thereupon *Chatterton*, as assignee, could only prosecute the action in his own name, and he obtained a proper order at the Rolls in the form of the old supplemental decree entitling him to prosecute the action. What was the effect of that? It was in fact from that moment to make him the Plaintiff in the action, and to make the old Defendant the Defendant in the action; and the course, I suppose ever since supplemental decrees were heard of, at all events the course for centuries has been, in all subsequent proceedings, to put in both titles; that is, the title of the original cause, and the title of what used to be called the supplemental cause, which was formerly a new cause. Since the *Judicature Act*, as there is a provision in the Rules that where there is no rule upon the subject the old practice shall prevail, that practice has always been adopted. There would have been before the *Judicature Act* a supplemental order obtained; that practice obtained where there was a real supplemental cause before the *Judicature Act* in the Court of Chancery; and in the Court of Common Law,

C. A. 1880 SEEAR v. LAWSON.

where there was an order; and was continued of course under the *Judicature Act*, as the practice was not altered by the Rules. Consequently every proceeding taken after the order at the Rolls should have been headed (as I see this motion is headed) in both causes. The statement of claim ought to have been headed in the same way to shew who the present Plaintiff is, and it ought to have contained a statement shewing how the Plaintiff got his title, and the proper order is no doubt to direct the Plaintiff to amend by inserting a new or second title, and also by adding such words as he may think proper to shew how his title is derived.

COTTON, L.J.:—

I am of the same opinion. The Respondent here contends that his pleadings are in proper form; in my opinion they are not. What he wishes to do is to treat the supplemental order as if it were a power of attorney from *Seear* enabling him to use *Seear's* name in the action. It is not so, it is the old supplemental order now obtained in a different way from that in which it was obtained before when it was necessary to file a supplemental bill in order to obtain it. By virtue of the supplemental order, *Chatterton*, the new Plaintiff, not in the name of *Seear*, but in his own name, carries on the action as *Seear* might have done if he had continued entitled to the property, and as this is so, according to the old established practice, such averments ought to be introduced by way of amendment instead of by supplemental bill as will shew how the title, originally that of *Seear*, has devolved upon the now Plaintiff *Chatterton*. In my opinion, upon the matter of substance the Defendant was right; possibly his summons was wrong in form, but as it has been resisted throughout upon the question of substance where he was right, in my opinion the costs ought to follow the result.

LUSH, L.J.:—

I am entirely of the same opinion.

Solicitors for Appellant: *G. S. & H. Brandon.*
Solicitor for Respondent: *H. W. Chatterton.*

In re EMPRESS ENGINEERING COMPANY.

C. A.
1880
July 21.

Agreement by Promoters—Ratification by Company—Contract to pay Money to Third Party.

A. and *B.* agreed with *C.*, on behalf of a company intended to be formed, that *A.* and *B.* should sell and the company buy a certain business, and it was a term of the agreement that sixty guineas should be paid to *J.* & *P.*, solicitors, for their expenses and charges in registering the company. The memorandum of association adopted this agreement, and the directors subsequently ratified it. An order having been made for winding up the company, *J.* & *P.* claimed to prove for the sixty guineas:—

Held (affirming the decision of *Little*, V.C.), that the claim must be disallowed, for that the contract between *A.* and *B.* and *C.* having been entered into before the company was in existence, could not by mere ratification be made binding on the company, and that a contract between *A.* and *B.* and the company, to which *J.* & *P.* were in no way parties, that the company should pay money to *J.* & *P.*, would not entitle *J.* & *P.* to proceed against the company.

Gregory v. *Williams* (1) explained.

THIS was an appeal by *Jones* & *Pride* from a decision of the Vice-Chancellor of the Court of Chancery of the County Palatine of *Lancaster*.

By an agreement dated the 2nd of May, 1879, made between *Glasier* and *Archer* of the one part, and *J. H. T. Cottier*, for and on behalf of a company intended to be registered as a limited company and to be called "*The Empress Engineering Company*," of the other part, reciting that *Glasier* and *Archer* had acquired the right of manufacturing "the *Empress* water motor" and had for some time past carried on the manufacture thereof upon the premises therein mentioned, and that the memorandum of association of the company had been prepared and that the nominal capital was to be £10,000 in 2000 shares of £5 each, it was agreed that *Glasier* and *Archer* should sell and the company should purchase for £3000, to be discharged in 600 fully paid-up shares of £5 each in the company, all the right of the vendors to manufacture "the *Empress* water motor," and the assets of the business. By clause 8 it was stipulated that the costs of and incidental to the agreement,

(1) 3 Mer. 582.

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and all preliminary and other costs, charges, and outgoings, disbursements, and expenses, either before or after the company should have been registered, should be borne and paid by the company. Clause 9: "The sum of sixty guineas shall be paid to Messrs. *Jones & Pride*, solicitors, *Liverpool*, by the company for the incorporation thereof, such sum to include only the preparation of the necessary documents and printing thereof for registration and registration fees and *London* agents' charges." This agreement was duly registered.

The company was incorporated without articles under a memorandum of association dated the 9th of May, 1879, which stated its object to be, 1. to give effect to and carry into execution the above agreement of the 2nd of May, 1879; 2. to carry on the business mentioned in the agreement and generally to carry on the business of engineers and machine makers. Certain further purposes were mentioned to which it is not necessary to refer. The liability was limited, and the capital was fixed at £10,000, divided into 2000 shares of £5 each.

At a meeting of the directors held on the 23rd of June, 1879, at which the said agreement of the 2nd of May was produced and read, a resolution was carried "that the agreement of purchase be ratified."

Messrs. *Jones & Pride*, named in the agreement, acted as solicitors to the promoters in the formation of the company, and after its registration acted as solicitors to the company.

On the 10th of December, 1879, a compulsory order for winding up the company was made on the petition of *Jones* and *Pride* in the Court of the County Palatine.

Under the winding-up *Jones & Pride* carried in a claim for £92 5*s.* 6*d.*, being the amount of the above-mentioned £63 and £29 5*s.* 6*d.* for business done by them as solicitors to the company after its registration. The latter amount was not disputed, but the £63 was objected to. The matter was adjourned to be heard before the Vice-Chancellor, who disallowed the £63 and admitted the claim for £29 5*s.* 6*d.* only. *Jones & Pride* appealed.

Snow, for the Appellants:—

I submit that *Jones & Pride* can claim the benefit of this con-

tract on the ground that the promoters were trustees of it for them.

[JESSEL, M.R.:—*Jones & Pride* were not parties to the contract, and were not bound by it. How can they claim the benefit of it?]

The circumstances in *Gregory* v. *Williams* (1) were almost identical with those of the present case.

[JESSEL, M.R.:—In that case Sir *W. Grant* appears to have considered that there was a declaration of trust. I know of no case where, when *A.* simply contracts with *B.* to pay money to *C.*, *C.* has been held entitled to sue *A.* in equity.]

In *Touche* v. *Metropolitan Railway Warehousing Company* (2) the person for whose benefit the agreement was entered into was held entitled to sue.

[JESSEL, M.R.:—In that case the Lord Chancellor finds, as a fact, that *Walker* was to receive the money as a trustee for the plaintiffs. If you can make out that *Jones & Pride* are *cestuis que trust* that alters the case. It appears to me that they are not. The promoters were liable to *Jones & Pride*, who are simply their creditors. *A.* being liable to *B.*, *C.* agrees with *A.* to pay *B.* That does not make *B.* a *cestui que trust*.]

The cases as to the third party suing are collected in *Pollock* on Contracts (3).

[BRETT, L.J.:—How do you make out any contract by the company?]

This agreement was adopted by the memorandum of association and ratified by the directors.

[BRETT, L.J.:—As to ratification of an agreement made before the company was in existence, you are met by *Melhado* v. *Porto Alegre, &c., Railway Company* (4).]

Vice-Chancellor *Malins*, in *Spiller* v. *Paris Skating Rink Company* (5), held that the doctrine of that case was not accepted in Courts of Equity.

(1) 3 Mer. 582.
(2) Law Rep. 6 Ch. 671.
(3) 1st Ed. pp. 191, 192.
(4) Law Rep. 9 C. P. 503.
(5) 7 Ch. D. 368.

C. A. 1880 *In re* Empress Engineering Company.

[Jessel, M.R.:—In *Gregory* v. *Williams* (1) it appears that the agreement was that the defendant would, "out of the produce" of the property, pay what was due to *Gregory* on the promissory note, and apply the residue, so far as the same would extend, in satisfaction of the defendant's demand, and pay the surplus (if any) to *Parker*. It was a parol agreement part performed, and it created a trust of property.]

If the Court is against me on that ground, I submit that the claimants can make out their case on the principle of *In re Hereford and South Wales Waggon and Engineering Company* (2), where it was held that there was a good equitable claim for services rendered before the formation of the company, of which the company had the benefit.

[James, L.J.:—The question has never been tried whether the company has had the benefit of the claimant's services.

Jessel, M.R.:—That is a question of *quantum meruit*, and the subject for a distinct application.]

Gazdar, for the liquidator, was not called upon.

Jessel, M.R.:—

I must say that I do not see how it was possible for the Vice-Chancellor to have decided otherwise than he did. The contract between the promoters and the so-called agent for the company of course was not a contract binding upon the company, for the company had then no existence, nor could it become binding on the company by ratification, because it has been decided, and, as it appears to me, well decided, that there cannot in law be an effectual ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. It does not follow from that that acts may not be done by the company after its formation which make a new contract to the same effect as the old one, but that stands on a different principle. I am of opinion, therefore, that there was no contract binding the company to pay this £63 to Messrs. *Jones & Pride*.

(1) 3 Mer. 582. (2) 2 Ch. D. 621.

Supposing, however, that there was, it is then contended that a mere contract between two parties that one of them shall pay a certain sum to a third person not a party to the contract, will make that third person a *cestui que trust*. As a general rule that will not be so. A mere agreement between *A.* and *B.* that *B.* shall pay *C.* (an agreement to which *C.* is not a party either directly or indirectly) will not prevent *A.* and *B.* from coming to a new agreement the next day releasing the old one. If *C.* were a *cestui que trust* it would have that effect. I am far from saying that there may not be agreements which may make *C.* a *cestui que trust*. There may be an agreement like that in *Gregory* v. *Williams* (1), where the agreement was to pay out of property, and one of the parties to the agreement may constitute himself a trustee of the property for the benefit of the third party. So, again, it is quite possible that one of the parties to the agreement may be the nominee or trustee of the third person. As Lord Justice *James* suggested to me in the course of the argument, a married woman may nominate somebody to contract on her behalf, but then the person makes the contract really as trustee for somebody else, and it is because he contracts in that character that the *cestui que trust* can take the benefit of the contract. It appears to me, therefore, that on both the grounds mentioned by the Vice-Chancellor this claim cannot be supported.

There is another ground suggested, namely, that as the company has had the benefit of the registration they ought to pay for it. But the answer to that is this—that was not the claim brought forward. The claim brought forward was for an agreed sum of £63, and any order we make (I do not know whether it is necessary to express it) will not prejudice that claim, which is merely for an amount due for services the benefit of which has been taken by the company.

JAMES, L.J.:—

I am entirely of the same opinion.

I think it is perhaps as well that we should say that *Gregory* v. *Williams* seems to be misunderstood. When that case is considered with the careful criticism with which the Master of the

(1) 3 Mer. 582.

C. A. 1880 *In re* EMPRESS ENGINEERING COMPANY.

Rolls has examined it, it appears quite clear that there was there a transfer of property with a declaration of trust in favour of a third person, which was a totally different thing from a mere covenant to pay money to that person. As regards the other point, notwithstanding what was said by Vice-Chancellor *Malins* in *Spiller* v. *Paris Skating Rink Company* (1), it appears to me that it is settled, both in the Courts of Law and by us in the Court of Appeal in that case to which we have been referred of *In re Hereford and South Wales Waggon and Engineering Company* (2), that a company cannot ratify a contract made on its behalf before it came into existence—cannot ratify a nullity. The only thing that results from what is called ratification or adoption of such a contract is not the ratification or adoption of a contract *quâ* contract, but the creation of an equitable liability depending upon equitable grounds. It is inequitable for a man not to pay for the services of which he has taken the benefit. That was the only ground upon which we held that, in that case, *Walter* and *Head* would have had a claim for services before the registration of the company, had not an equitable defence been effectually set up on the ground of a fraudulent concealment of the agreement.

BRETT, L.J.:—

I am of the same opinion.

JAMES, L.J.:—

The appeal will be dismissed with costs. It will be without prejudice to any equitable claim on a *quantum meruit*. I may add, as the Master of the Rolls pointed out to me in the course of the argument, that in *Gregory* v. *Williams* (3) the man with whom the contract was made was one of the plaintiffs, and the only defence there would have been misjoinder of plaintiffs, and that is a defence which the Court was not likely to view with much favour.

Solicitors: *A. S. Mather, Liverpool; Jones & Pride, Liverpool.*

(1) 7 Ch. D. 368. (2) 2 Ch. D. 621.

(3) 3 Mer. 582.

Ex parte LACEY. *In re* LACEY.

C. A.
1880
C. J. B.
June 7.
C. A.
Dec. 9.

Composition—Creditor omitted from Statement of Affairs—Application after Registration of Resolutions to admit Proof—Jurisdiction of Court—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.

After the registration of simple composition resolutions (by which no trustee is appointed for the receipt and distribution of the composition and no security is given for its payment) the proceedings are at an end, and the Court of Bankruptcy has no jurisdiction to entertain an application by a creditor, who was omitted from the debtor's statement of affairs, and who has taken no part in the proceedings, for the admission of a proof of his debt.

Ex parte Carew (1) explained and distinguished.

Breslauer v. *Brown* (2) explained.

Decision of *Bacon*, C.J., reversed.

ON the 9th of August, 1877, *W. R. Lacey* filed a liquidation petition in the *Chelmsford* County Court. The creditors at their first meeting, on the 1st of September, 1877, resolved to accept a composition of 19*s.* 11½*d.* in the pound, payable in two years from the date of complete registration of the resolutions. No trustee was appointed to receive and distribute the composition, and no security was given for its payment. The resolutions were confirmed at the second meeting of the creditors on the 15th of September, 1877, and were registered on the 6th of December, 1877. The composition was paid when it became due to all the creditors who were mentioned in the debtor's statement of affairs. On the 3rd of March, 1880, *F. W. Bond*, who claimed to be a creditor for the sum of £73 10*s.*, but who had not been mentioned in the statement of affairs and had not attended either of the creditors' meetings, made an affidavit in the County Court, headed in the matter of the liquidation proceedings, in proof of his alleged debt, and applied to the Court to admit the proof. *Bond* had previously taken some proceedings against *Lacey* in respect of the alleged debt by way of judgment debtor's summons and debtor's summons, but without success, and he stated that he did not know of the composition resolutions until early in the year 1880. The Registrar, acting as Judge, refused the application, on the ground

(1) Law Rep. 10 Ch. 308. (2) 3 App. Cas. 672.

C. A. 1880 *Ex parte* LACEY. *In re* LACEY.

that the Court had no jurisdiction to entertain it. *Bond* appealed to the Chief Judge.

The appeal was heard on the 7th of June, 1880.

Winslow, Q.C., and *G. Rose-Innes*, for the Appellant:—

A creditor is not to lose the benefit of a composition simply because his name and address and the amount of the debt have been, on purpose or by mistake, left out of the compounding debtor's statement: *Ex parte Carew* (1).

There is ample jurisdiction under the 126th section of the Act to enforce the provisions of the composition.

E. Cooper Willis, and *W. Nicholson*, for the Respondent:—

The Registrar's order is right. The proceedings are at an end, and the Court has no jurisdiction to entertain the application. *Ex parte Carew* is distinguishable.

BACON, C.J.:—

I am not sure that you have not a right to come to the Court to enforce the payment of the composition, but that is not the shape which the application has taken either in the Court below or here. You ask me to admit a proof of your debt. I think you are entitled to prove your debt. That the Court has jurisdiction in the matter I have no doubt whatever, and I do not think the rules stand in the way of the proof. I think the right to payment of the composition can be dealt with and can be enforced by the Court. Upon the proof, so far as it has gone, I think that there is sufficient evidence of the existence of the debt. I think the only way in which the case can be properly brought before the Court is by proving the debt and getting an order for the payment of the composition.

Winslow:—We do not ask that.

BACON, C.J.:—It will give no more trouble to prove the debt and get an order for the payment of the composition. The fact that the Appellant has tried to obtain payment by proceedings in

(1) Law Rep. 10 Ch. 308.

another Court does not affect the right of proof. The matter had better go back to the County Court Judge in an amended form.

Upon the evidence before me I admit the proof.

C. A. 1880 *Ex parte* LACEY. *In re* LACEY.

Winslow:—Then I understand your Lordship remits the matter back to the County Court Judge to admit the proof, with liberty to the creditor to apply to enforce the payment of the composition.

BACON, C.J.:—Yes, and I think the appeal must follow the usual course as to costs.

From this decision the debtor appealed. The appeal was heard on the 9th of December, 1880.

C. A.

E. Cooper Willis, and *F. Cooper Willis*, for the Appellant:—

After the registration of composition resolutions the Court has no jurisdiction to admit a proof of debt by a creditor who was omitted from the debtor's statement of affairs, and who is not bound by the composition. A composition is an arrangement between a debtor and his admitted creditors, and the admission must be without any reserve: *Melhado* v. *Watson* (1). No doubt an omitted creditor may come in and bind himself as in *Campbell* v. *Im Thurn* (2). In that case creditors who were omitted from the debtor's statement of affairs voluntarily came in and voted in favour of the composition, and it was held that they were bound by it. In *Ex parte Carew* (3) the debtor had, in his statement of affairs, mentioned that a claim had been made upon him in respect of a breach of trust, and said that he did not admit the liability, though he estimated it at £1500. A Chancery suit was in fact then pending to enforce the claim. The plaintiffs in the suit did not attend the composition meetings, but before the first meeting their solicitors gave notice of their claim to the debtor's solicitors, who afterwards acted for the trustees appointed to carry out the composition. A fund was placed in the hands of the trustees sufficient to pay the composition to all the creditors, including the claimants in the Chancery suit. The trustees having

(1) 2 C. P. D. 281. (2) 1 C. P. D. 267.
(3) Law Rep. 10 Ch. 308.

C. A. 1880 *Ex parte* LACEY. *In re* LACEY.

paid the composition to all the other creditors, the debtor applied to the Court to order them to hand over the surplus to him, the Chancery suit being still pending. And the Court of Appeal held that the trustees must retain the surplus until the Chancery suit was decided, and that, if the plaintiffs should be successful, they would be entitled to apply to the Court of Bankruptcy for an order that the trustees should pay them the composition. The application in that case was, therefore, as to the disposition of a fund which was in the hands of officers of the Court, and the Court held that the debtor who was seeking the aid of a Court of Equity must himself do equity.

[LUSH, L.J.:—The judgment of Lord Justice *Mellish* in that case seems to have gone further than the facts required.]

The observations of the Lords, in *Breslauer* v. *Brown* (1), upon *Ex parte Carew* (2) shew that that case depended on its special circumstances, which were very different from those of the present case.

[JAMES, L.J.:—Lord *Hatherley*, in *Breslauer* v. *Brown* (3), says that Lord Justice *Mellish* held in *Ex parte Carew* that the creditor "might, as against the debtor, come in at any time before the actual distribution of the fund had been completed, and say that he waived all those conditions as to his name and address and the amount due to him being stated in the schedule, and that now he elected to have the benefit of the composition, and that benefit was given to him accordingly."]

When the registration of the resolutions is completed the Court of Bankruptcy has no jurisdiction, except that which is expressly conferred upon it by sect. 126, "to enforce the provisions of the composition on a motion made by any person interested," and the further power given by the same section to adjudge the debtor a bankrupt, if it appear "that a composition cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor." The power to enforce a composition does not authorize the admission of a proof by a person who is not bound by the composition, and

(1) 3 App. Cas. 672. (2) Law Rep. 10 Ch. 308.
(3) 3 App. Cas. 683.

who has not come in until after the registration of the resolutions and the payment of the composition to all the other creditors; such a person is not a "person interested" in the composition.

[COTTON, L.J.:—It seems to me that the decision of Lord Justice *Mellish* in *Ex parte Carew* (1) really amounted only to this, that the plaintiffs in the Chancery suit were inserted in the debtor's statement of affairs, though imperfectly, and that the Court was in substance asked to enforce the provisions of the composition, though, no doubt, some of the expressions in his judgment went beyond that.]

Winslow, Q.C., and *G. Rose-Innes*, for the creditor:—

It is in the election of the omitted creditor whether he will accept the composition or not; he is entitled to do that which is most for his benefit. What distinction is there in principle between the case of a debtor omitting a creditor from his statement altogether and the case of his inserting the creditor's name and saying there is nothing due to him, or I dispute his claim? In principle the two cases are exactly the same. This was evidently the view of Lord *Blackburn* in *Breslauer* v. *Brown*. He cites (2), with approval, the judgment of Lord Justice *Mellish* in *Ex parte Carew*, where he expressed an opinion that an application to the Court, under sect. 126, to enforce the provisions of a composition might be made "not only by a creditor who is bound because his name, address, and the amount of his debt had been properly entered in the statement, but by any creditor of the debtor who would, in case of his being made a bankrupt, or in the case of a liquidation, have been entitled to prove his debt;" and Lord *Blackburn* said that this could not be treated as an *obiter dictum*, because Lord Justice *Mellish* himself said that it was "necessary to decide" the point.

[COTTON, L.J.:—Do not the observations of Lord *Blackburn* apply only to the case of a creditor who comes in pending the proceedings to make the composition binding, *i.e.*, before the registration of the resolutions?]

(1) Law Rep. 10 Ch. 308. (2) 3 App. Cas. 702.

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The words of Lord Justice *Mellish*, which Lord *Blackburn* cites, go much further.

[COTTON, L.J.:—In *Ex parte Carew* (1) the claim had been mentioned in the debtor's statement, and a fund had been set apart in the hands of the trustees for the purpose of meeting it.]

The claimants did not attend the meetings, or in any way influence the proceedings. It cannot signify at all at what time the application is made by the omitted creditor.

[JAMES, L.J.:—The decision in *Ex parte Carew* was that the claimants might waive the condition imposed by sect. 126 in their favour, and come in while the proceedings were pending, *i.e.*, while there was a fund in the hands of the trustees.

COTTON, L.J.:—Suppose the payment of a composition to the creditors named in the debtor's statement was guaranteed by a surety, according to your argument, if an omitted creditor came in after the registration of the resolutions, the surety must pay the composition to him also.]

Not necessarily, for every composition must be enforced according to its terms. Of course the surety might, if he chose, guarantee the payment of the composition to all the creditors of the debtor. An arrangement for a composition entered into with a part only of the debtor's creditors would not be valid under sect. 126; he is bound to offer the composition to all his creditors. He will not be allowed, after the arrangement has been made, to say to a creditor whom he has omitted, I intended to leave you out, and you are too late to come in now. If the Appellant's argument is sound, a debtor can always, by omitting from his statement the name of any creditor whom he does not wish to pay, deprive him of the benefit of an advantageous composition, and distribute all his assets among his friendly creditors. It is not the practice to advertise the registration of composition resolutions, so that an omitted creditor might know nothing of the composition till long after the time appointed for its payment had expired. There has been no delay on the Respondent's part; he applied to the Court as soon as he knew of the composition.

(1) Law Rep. 10 Ch. 308.

E. Cooper Willis, in reply:—

An omitted creditor can come in only during the pendency of the proceedings; after the registration of the resolutions the Court has no jurisdiction to admit his proof. In this respect composition proceedings differ from bankruptcy or liquidation proceedings. Are the proceedings to go on for ever? There is no provision for closing a composition, as there is for closing a bankruptcy or a liquidation. Proceedings against a surety must be taken, not in the Bankruptcy Court, but in the High Court: *Ex parte Mirabita* (1).

JAMES, L.J.:—

I am of opinion that this decision of the Chief Judge is an extension of the doctrine laid down in *Ex parte Carew* (2) which we ought not to sanction, even if that doctrine goes to the full extent which has been suggested. In the present case there is no property to be administered and no proceedings pending; there is nothing now to be done in the composition except to enforce a personal demand of the creditor against the debtor. I am of opinion that the Court of Bankruptcy has no jurisdiction to entertain a merely personal demand against a debtor, there being no property for the Court to administer. When the judgment of Lord Justice *Mellish* in *Ex parte Carew* was read to us, a judgment in which I appear to have concurred, it did not strike my mind as something which I was prepared to accept. It must, however, be read with reference to the facts of that particular case. In that case the debtor in his statement of affairs had mentioned the fact that a claim had been made against him in respect of an alleged breach of trust, and that he estimated the amount of it at £1500, though he said that the liability was not admitted by him, and a fund had been placed in the hands of trustees for the purpose of meeting, not merely the composition to the admitted creditors, but actually to meet the composition on that very claim. The trustees had paid the composition to the admitted creditors, and the debtor then said, Give me back the surplus. And it was held by the Court that it had jurisdiction to deter-

(1) Law Rep. 20 Eq. 772. (2) Law Rep. 10 Ch. 308.

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mine upon the debtor's claim to the surplus, and it refused to hand it over to him while the validity of the claim, to meet which a fund had been placed in the hands of trustees, had not been ascertained. That was the whole of the decision. And what Lord Justice *Mellish* really said was that the creditor whose claim had not been admitted might waive the condition which was imposed by sect. 126 for his benefit, and come in and bind himself by the composition while the thing remained still *in fieri* and incomplete. That was, as I understand it, the view of Lord *Hatherley* in *Breslauer* v. *Brown*, (1) and it was assented to by Lord *Blackburn*, that is to say, that a creditor whose debt was not admitted might come in and accept the composition during the pendency of the proceedings. In my opinion the proceedings in the present case can in no sense be said to be now pending; there is nothing of which you can allege that it is pending. If there is to be no limit of this kind, a creditor might come forward any number of years after the registration of composition resolutions and say, I am a creditor, you have engaged to pay your creditors so many shillings in the pound. You ought to have entered my name in your statement of affairs, and you did not; now pay me those so many shillings in the pound on my debt. The creditor who is omitted is not bound to take the composition; he can bring his action against the debtor for the whole amount of his debt. Why, then, should he come here for a smaller sum? It seems to me unreasonable. He is coming simply to enforce a personal remedy against the debtor for a smaller sum, when he has never bound himself to give up his whole debt. In *Breslauer* v. *Brown* the creditor had already accepted the composition in respect of one debt, and he then claimed the payment of another debt which had not been inserted in the debtor's statement. His acceptance in respect of the first debt could not entitle the debtor to say that he had bound himself by the composition in respect of the second debt, and therefore it was held that he was still a creditor, and entitled to sue the debtor for the second debt. So here, the Respondent ought to have taken proceedings against the debtor for his debt, and indeed he did take some proceedings in which he did not succeed, though we do not know why. Having

(1) 3 App. Cas. 683.

failed in those proceedings, he now attempts to fall back on the composition. I am of opinion that he cannot do this. He cannot be heard to say that he did not know of the composition proceedings of which the proper statutory notices were given. The present case is really not governed by *Ex parte Carew* (1), when that decision is thoroughly understood.

COTTON, L.J.:—

I am of the same opinion. The composition became binding by virtue of the resolutions passed by the requisite statutory majority of the creditors, and the registration of the resolutions. The Respondent alleges that he was then, and is now, a creditor of the debtor, but his claim is disputed. His name was not inserted in the debtor's statement of affairs, nor did he take any part in the proceedings under the petition. Under sect. 126 he is clearly not bound by the composition. The question is, whether he ought to resort to the ordinary tribunals to have his debt ascertained, and to obtain a judgment against the debtor for it, or whether he is at liberty to resort to the Court of Bankruptcy to prove his debt and to enforce payment by the debtor of the composition of 19*s.* 11½*d.* in the pound. In my opinion he is not entitled to come to the Court of Bankruptcy. Sect. 126 provides that "the provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shewn in the statement of the debtor, produced to the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors." But, it is said, can a creditor be absolutely excluded from the benefit of the composition by the fraud of the debtor or any other circumstances? If a debt is improperly set down in the debtor's statement, the statement can be amended before the registration of the resolutions, there being a provision in sect. 126 for the correction of "any mistake inadvertently made by a debtor in the statement of his debts," and in the same way there is an opportunity for an amendment of the statement if a creditor whose name has not been mentioned in it comes in and asserts his claim before the registration of the reso-

(1) Law Rep. 10 Ch. 308.

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lutions. If he does not do this, that case is also provided for in sect. 126, for he is not bound by the composition, and he can sue the debtor in the ordinary tribunals for the full amount of his debt. Moreover, there is the last clause of the section, which enables the Court to adjudge the debtor a bankrupt "if it appear to the Court on satisfactory evidence" that the composition "cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor." That clause could be made available to prevent a composition, which ought to be made for the benefit of all the debtor's creditors, from being made for the benefit of some only, excluding others who ought to have been mentioned in the debtor's statement. We are not overruling any decision that such a composition would be invalid; we have only to decide whether an omitted creditor can, after the registration of the resolutions, elect to proceed against the debtor in the Court of Bankruptcy instead of in the ordinary tribunals. In my opinion he cannot. There is no provision in the Act or in the Rules enabling him to do so. The only provision enabling the Court of Bankruptcy to interfere is that which empowers it to enforce the provisions of a composition on the motion of any person interested. In my opinion, on the construction of sect. 126, independently of any previous decision, this appeal ought to be allowed.

Two cases, however, were relied upon on behalf of the Respondent. But the decision in *Ex parte Carew* (1) presents no difficulty whatever. There the claim of the creditor was not omitted altogether from the debtor's statement, but it was mentioned as a claim, the amount of which was not yet definitely ascertained, and which was not admitted at all, and a fund was placed in the hands of trustees for the payment of the composition to the creditors mentioned in the debtor's statement, and also that particular claimant. Lord Justice *Mellish*, in his judgment, said that if it were a case of bankruptcy or liquidation the claimant in a Chancery suit might present his claim, and might ask the Court of Bankruptcy to postpone the proof of the debt until the case had been decided in Chancery. Why, he said, should not the same course be taken there? He was not dealing with the

(1) Law Rep. 10 Ch. 308.

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question whether there was a right to proceed against the debtor personally in the Court of Bankruptcy, but was considering whether a fund should be handed over by the trustees to the debtor without regard to the claim in the Chancery suit, the fund having in fact been constituted with reference to the amount of the claim if it should be established. That may well be a right decision without it in any way helping the case of the present Respondent. No doubt there are observations made by Lord Justice *Mellish* which go further, but the observations of a Judge must always be construed with reference to the case which was before him. The creditor in that case had, as far as he could, come in before the end of the proceedings, *i.e.*, before the registration of the resolutions. Then it is said that we are bound by the observations of Lords *Hatherley* and *Blackburn* upon *Ex parte Carew* (1), in the case of *Breslauer* v. *Brown* (2) in the House of Lords. It must, however, be remembered that they were then removing *Ex parte Carew* out of the way of their decision, not relying upon it as an authority. Yet of course their observations are entitled to the greatest weight. Lord *Hatherley*, however (3), does put the case of *Ex parte Carew* upon the ground to which I have referred, viz., "that the creditor might, as against the debtor, come in at any time before the actual distribution of the fund" and waive the condition as to the insertion of his name and address and the amount due to him in the debtor's statement, and might elect to have the benefit of the composition. Possibly Lord *Blackburn* made use of some expressions which appear to go further, but yet I think his observations shew that he was dealing with the case of a creditor who had come in before the resolutions had been registered. He says (4), "If a man came in during the proceedings" and claimed to prove for a debt which had been omitted from the list, and then voted against the composition, he would be bound by the resolution if it was passed by the statutory majority, "because he had become a party to the proceedings." He is evidently referring to the case of a creditor coming in before the proceedings are terminated, before the resolution passed has become binding, *i.e.*, before it has been registered. I am of

(1) Law Rep. 10 Ch. 308.
(2) 3 App. Cas. 672.
(3) 3 App. Cas. 683.
(4) Ibid. 703.

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opinion, therefore, that *Ex parte Carew* (1) is, having regard to its facts, no authority for the present case, and that what was said in the House of Lords in *Breslauer* v. *Brown* (2) does not prevent us from exercising our own judgment upon the construction of the statute. I should not wish to get rid of anything which was said by the Judges, merely because the case might have been decided upon other grounds. But, looking fairly at what was said by Lords *Hatherley* and *Blackburn*, I do not think that they intended to lay down anything inconsistent with our present decision.

LUSH, L.J.:—

I am of the same opinion.

Winslow asked for leave to appeal to the House of Lords.

JAMES, L.J.:—

We cannot allow an appeal relating to a sum of £73.

Solicitors for Appellant: *John Evans & Peacock.*
Solicitors for Respondent: *G. Rose Innes & Son.*

(1) Law Rep. 10 Ch. 308. (2) 3 App. Cas. 672.

ASLATT *v.* CORPORATION OF SOUTHAMPTON.

M. R.
1880
Nov. 8.

[1880 A. 1194.]

Corporation—Alderman—Disqualification—Insolvency—Composition with Creditors—Avoiding Office—Municipal Corporation Act, 1835 (5 & 6 *Will.* 4, *c.* 76), *s.* 52—*Debtors Act*, 1869, *s.* 21—*Jurisdiction—Injunction—Assigned Business—Judicature Act*, 1873, *s.* 25, *sub-s.* 8; *s.* 34.

11 QBD 34
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The Plaintiff, an alderman of a borough, made a composition with his creditors, but executed no composition deed; nor were any composition proceedings taken under the *Debtors Act*, 1869. He had, however, executed a bill of sale, duly registered, to a person not a creditor, to secure a sum of money advanced by him to meet the amount of the composition. A meeting of the corporation of the borough having been summoned by notice for the purpose of declaring the office held by the Plaintiff void under the *Municipal Corporation Act*, 1835 (5 & 6 Will. 4, c. 76), s. 52, and the *Debtors Act*, 1869, s. 21, and electing a successor:—

An injunction was granted, at the instance of the Plaintiff, restraining the corporation from proceeding under their notice, on the ground, (1) that, having regard to the express words of the above sections, the Plaintiff had not become disqualified from holding office; (2) that under sect. 25, sub-s. 8, of the *Judicature Act*, 1873, the Court had jurisdiction to grant the injunction; and (3) that, having regard to sect. 34 of the same Act, the action, which claimed the injunction only, had been properly brought in the Chancery Division.

The jurisdiction of the Chancery Division to interfere by injunction under *Judicature Act*, 1873, s. 25, sub-s. 8, considered.

THIS was a motion by the Plaintiff for an injunction to restrain the Defendants from avoiding or declaring void the office of alderman of the borough of *Southampton*, now held by the Plaintiff, or appointing or electing any successor to him as such alderman, or taking any steps for any of the purposes aforesaid, or otherwise acting in reference to such declaration or election according to a notice of intention in that behalf given by the Defendants, or in any way interfering with the exercise by the Plaintiff of his rights and privileges as alderman.

The Plaintiff, who was a coachbuilder, in January in the present year, submitted a proposition to a meeting of his creditors, seventy in number, for a composition of 7*s.* 6*d.* in the pound on their debts, which composition was accepted by a considerable number of the creditors by a resolution and a circular letter. The

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Plaintiff never executed any composition deed, or took any composition proceedings whatever under the *Bankruptcy Act*, 1869. He had, however, executed a bill of sale, duly registered, of his stock-in-trade and book debts to a stranger as security for the amount required by him for the composition.

On the 4th of the present month, the Mayor of *Southampton*, in compliance with a requisition of thirteen members, summoned a meeting of the corporation by notice for this day (Nov. 8) at half-past two in the afternoon, for the purpose, amongst other business, of declaring the office of alderman held by the Plaintiff void, "he having become disqualified to hold the same by reason of his having compounded and arranged with his creditors;" and of electing a successor.

The Plaintiff thereupon brought this action claiming an injunction in the above terms, and this morning, at the sitting of the Court, moved on notice by special leave. He was called and cross-examined upon his affidavit in support of the motion, when it appeared that the bill of sale was executed solely for the benefit of the person who had advanced the money required for payment of the composition.

Chitty, Q.C., and *Maidlow*, for the Plaintiff.

Ince, Q.C., and *E. T. Holland*, for the Defendants:—

First, we submit that the Plaintiff comes within the provisions of the *Municipal Corporation Act*, 1835 (5 & 6 Will. 4, c. 76), which enacts (sect. 52), "that if any person holding the office of mayor, alderman, or councillor, for any borough shall be declared bankrupt, or shall apply to take the benefit of any Act for the relief of insolvent debtors, or shall compound by deed with his creditors, . . . then and in every such case such person shall thereupon immediately become disqualified, and shall cease to hold the office of such mayor, alderman, or councillor as aforesaid . . ." By sect. 21 of the *Debtors Act*, 1869, the disqualification is extended to every arrangement or composition by a mayor, &c., "with his creditors under the *Bankruptcy Act*, 1869, whether the same is made by deed or otherwise."

It may be urged that in the present case the Plaintiff did not

compound by deed, nor did he make a composition under the *Bankruptcy Act*, 1869, and that consequently he does not come within the literal words of the statutes, but we submit that the object and spirit of the statutes are to disqualify an insolvent person from holding office.

Secondly, this Court will not interfere by injunction when the question is, as here, merely one of personal *status*, and not one of property.

[JESSEL, M.R.:—But the Plaintiff is one of a body of persons entrusted with the management of the property of the corporation: the question is therefore one of property.]

We admit that the corporation has property, but that is only incidentally involved in the present question. There is no instance of such an injunction having been granted in such a case as this.

Then, thirdly, we submit that the Chancery Division has no jurisdiction, the case being one of the class assigned to the Queen's Bench Division. Where a person unlawfully holds possession of an office in a corporation, the Act 9 Anne, c. 20, provides a remedy by information in *quo warranto* on an application to the Court of Queen's Bench only. This matter, therefore, being one which was within the exclusive cognizance of that Court, is, by sect. 34 of the *Judicature Act*, 1873, now specially reserved to the Queen's Bench Division.

[They referred to *Reg.* v. *Councillors of Derby* (1); *Attorney-General* v. *Mayor of Liverpool* (2); *Hardwick* v. *Brown* (3); *Hedley* v. *Bates* (4); *Brice* on *Ultrà Vires* (5).]

JESSEL, M.R.:—

In a case of this great importance I should have been very glad if an opportunity could have been afforded, in the first instance, to counsel to make themselves more thoroughly familiar with the whole of the subject than it has been possible for them to do in the short time allowed; and, in the next place, for the Court also to consider the various serious and important ques-

(1) 7 A. & E. 419.
(2) 1 My. & Cr. 171, 201.
(3) Law Rep. 8 C. P. 406.
(4) 13 Ch. D. 498.
(5) 2nd Ed. p. 875.

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tions which have been raised, before delivering a judgment which, from the nature of the case, though it is on an interlocutory application, must be final; because if the matter is not disposed of to-day it can never be disposed of at all. However, I am not entitled to deny justice simply because the time allowed me to make up my mind on the difficult questions involved is limited, where the necessity of the case compels me to adjudicate to-day or not at all; and I must say that if any miscarriage should take place, the Defendants are alone to blame, because, the Plaintiff having made a partial composition with his creditors in January of this year—a fact which, in my opinion, must have been known in the town of *Southampton*, this gentleman being an alderman of the town, and the proposed composition having been submitted to the meeting of creditors, seventy in number—no step is taken by the corporation with a view to forfeiting the office of alderman, which he held, until the notice of the 4th of November instant, and then a meeting is called for to-day, the 8th of November, to declare the office void. Consequently, the pressure of time arises from the delay on the part of the corporation in taking any step from January of this year to the 4th of November.

The facts of the case appear to me to be clear beyond controversy. In January last there was a proposal for a composition to the Plaintiff's creditors: this was accepted by a considerable number of them, but not by all. The composition seems to have been accepted by resolution and by circular letter. There was no composition deed: the only deed executed by the Plaintiff was a bill of sale on his stock-in-trade, which appears to have been duly registered, and by which he assigned his stock-in-trade as a security for a sum of money which he had raised for the purpose of paying off the creditors, to which deed the creditors are not parties. It appears to me, therefore, that what took place last January was not a composition within the 52nd section of the *Municipal Corporation Act*, 1835; the words of the section are, "or shall compound by deed with his creditors." Nor was it a composition within the *Debtors Act*, 1869, which extended the provisions of the former Act to "every arrangement or composition by a mayor, alderman, or town councillor with his creditors under the *Bankruptcy Act*, 1869, whether the same is made by

deed or otherwise;" for this was not a composition under the *Bankruptcy Act*, 1869.

The result is, that according to the plain meaning of these sections, he is not liable to the penalty of a forfeiture of the office; and, whatever I may think as to the spirit or meaning of the section, I am not entitled to get rid of the limitation imposed by the Legislature; because if it was intended that a man compounding in any manner whatever with his creditors should be subject to the disqualification mentioned in the sections, nothing would have been easier than to have said so. The disqualification mentioned in the *Debtors Act*, 1869, is expressly limited to an arrangement or composition "under the *Bankruptcy Act*, 1869;" so that those words must have been put in intentionally, according to some view which I do not profess to understand; that is to say, a composition with creditors was not to be a disqualification unless it took place under the *Bankruptcy Act*, 1869.

The result, therefore, is, that this gentleman has not become disqualified and does not cease to hold office as an alderman. That being so, the corporation had no right to call a meeting to declare the office void, nor have they any right to impede him in his exercise of the office of alderman. It is said that the meeting itself will do him no harm; but that is not, in my opinion, a sufficient answer. It is no doubt an injury to him to declare the office void, if it is not void; and it is more than an injury to elect some one else to fill the office, and thereby impede him in the exercise of that office.

On the merits, therefore, if they can be called merits—that is, on the legal aspect of the case—I have no doubt whatever that what is proposed to be done on the part of the corporation is not warranted by the Act of Parliament.

That being so, a further question is raised as to whether I ought to interfere by injunction. It is said, and I believe with perfect truth, that no such injunction was ever heard of formerly; and there was a very good reason for it, namely, that the Courts of Common Law which exercised jurisdiction over cases of this kind had no power to grant an injunction, because the Act enabling them to do so was not passed until a very recent date, and therefore you could not have an injunction so far as the

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Common Law was concerned; nor was it the habit of the Court of Chancery to grant an injunction in aid of a legal right where the man was in possession of an office. The mere fact that some proceeding was being taken to test his right to continue in the office was never considered a ground for interfering by injunction. There was a reason for that. The old Court of Chancery did not interfere by injunction where there was a legal right in question—but only a legal right—being tried or put in a course for trial; and this led, in some cases, to a positive denial of justice. I mentioned in the course of the argument a case within my own experience, the case of *Reg.* v. *Mayor of Dover*, in which the Court of Queen's Bench solemnly decided, two years after the writ was issued and one year after the mayor had left office, that he had no right to be mayor at all. Such a state of things loudly called for a remedy; and, in my opinion, there was a remedy given by the 25th section (sub-sect. 8) of the *Judicature Act*, 1873, which says, "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." Of course the words "just or convenient" did not mean that the Court was to grant an injunction simply because the Court thought it convenient: it meant that the Court should grant an injunction for the protection of rights or for the prevention of injury according to legal principles; but the moment you find there is a legal principle, that a man is about to suffer a serious injury, and that there is no pretence for inflicting that injury upon him, it appears to me that the Court ought to interfere. Now it has been said—and I think truly said—that, as a general rule, the Court only interferes where there is some question as to property. I do not think that the interference of the Court is absolutely confined to that now; there may be cases in which the Court would interfere even when personal *status* is the only thing in question; but it is not necessary for me to decide that question at the present moment. Even if the limited rule only were to apply, it is admitted on the part of the Defendants, the Corporation of *Southampton*, that there is property involved—and of course they must have property, independent of the borough rates, they being an old corporation: and,

therefore, this gentleman is in a sense a trustee as one of the governing body, and has a part in the disposal of that property; and in that sense he has a right to say, "You are not to expel me or to deprive me of the right of attending and voting in the town council as an alderman of the borough, or from taking that share in the government of the borough which I am legally entitled to take."

It seems to me, therefore, that there is no reasonable ground on which I can be fairly asked to withhold the exercise of the jurisdiction which I decide is conferred upon me.

The only other point raised was this: it was said that this was business assigned to the Court of Queen's Bench, and that I ought not to interfere. Now there are two answers to that. In the first place, I think it is not assigned: this is an action for an injunction. The power of granting an injunction was given to the Courts of Law by the *Common Law Procedure Act*, 1854, and was not confined to any one division. An action might be brought for injury; that is, if an alderman had been turned out he could have brought an action against those who turned him out wrongfully, and that action might have been brought in any one of the three Courts, the Court of Queen's Bench, the Court of Common Pleas, and the Court of Exchequer. Therefore this is not, within the 34th section of the *Judicature Act*, 1873, business exclusively confined to the Court of Queen's Bench.

There is another answer. Even if it were, where an action has been brought in a wrong Division, the Judge has still jurisdiction to retain the action and to grant the relief asked, if he thinks it is a case which imperatively requires it. Now in the present case the meeting of the corporation is to take place at half past two o'clock to-day; therefore if I do not restrain the corporation and should order the action to be transferred to the Queen's Bench Division, it would be equivalent to a total denial of justice; and in my view, having regard to the provisions which I have just referred to, I ought to retain the action here and decide it.

On the whole, it appears to me a clear case for granting an injunction, and I therefore make an order restraining the Defendants from avoiding or declaring void the office of alderman of the borough of *Southampton* now held by the Plaintiff, or from taking

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any steps for that purpose, or from in any way interfering with the exercise by the Plaintiff of his rights or privileges of alderman until trial or further order.

By consent, the motion was treated as the trial of the action, and accordingly his Lordship granted a perpetual injunction, with costs.

Solicitors: *Stocken & Jupp; Clarkes, Rawlins, & Clarke; Walker, Belward, & Whitfield.*

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[1879 C. 412.]

Bankers—Advances to an Executor—Executorial Purposes—Separate Account of Executor.

One of two executors, who was himself a residuary legatee, entered an account with a banker in his own name for executorial purposes, and the banker, with notice of the dispositions under the will, made advances to the executor for payments connected with the executorship, and securities were deposited for repayment of the advances. The co-executor assented to the first advance, but upon a second advance being made to the acting executor upon other securities, he withdrew his assent, and objected to the banker being repaid out of the trust property, on the ground that the money had been placed to the separate account of the acting executor. The advances were duly applied to the purposes of the administration. Upon an action being brought by the banker for a lien upon the second securities for repayment of his advances:—

Held, that the banker was justified in advancing money to the acting executor for executorial purposes, and that the assent of the co-executor in the first instance was a further justification for placing confidence in the acting executor and in making further advances to him. The repayment was therefore decreed with mortgagee's costs.

THIS action was brought by Messrs. *Child & Co.*, the bankers, against *George Earlam Thorley* and *John Thomas Thorley*, as executors of the late *George Thorley*, of *Manchester*, claiming payment of a sum of £1154, which had been advanced to *John T. Thorley* for executorial purposes, and asking for a declaration that the Plaintiffs were entitled to a lien on certain certificates of railway stock deposited with them by *J. T. Thorley* for the amount due to them, and that the Defendants might be ordered to concur with them in selling the aforesaid railway stock; or, if the Court should be of opinion that *J. T. Thorley* had no authority as executor to deposit the certificates as security for the loan, then they asked a declaration that the debt might be paid out of the share of *J. T. Thorley* in the personal estate of the testator.

The testator, by his will, dated in August, 1876, gave all his real estate to *J. T. Thorley* absolutely, and he gave the whole of his personal estate, to the value of about £40,000, to be divided between *J. T. Thorley* and his three sisters in equal shares, and he

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appointed *George E. Thorley* and *J. T. Thorley* executors. The will was proved by both executors, but *J. T. Thorley*, with the assent of his co-executor, assumed the principal part in the administration of the estate, and in June, 1878, he, as such acting executor, deposited with the Plaintiffs, as his bankers, certain securities forming part of the estate as security for the advance of £3000, which was required by him for executorial purposes, and these securities were afterwards sold, the transfer being signed by both executors, and the Plaintiffs, at the desire of *J. T. Thorley*, placed the proceeds of the sale, amounting to £3874, to his account, and thereout repaid themselves the advance of £3000 with the interest due thereon. On the 22nd of January, 1879, the Plaintiffs lent to the Defendant *J. T. Thorley*, as such acting executor, a further sum of £1154, on the representation made by him that the money was required to discharge the legacy duty then payable on the testamentary residuary personal estate, and the money was so applied by *J. T. Thorley*. On the 11th of February, 1879, *J. T. Thorley* deposited with the Plaintiffs certificates for £2500 *London and North Western* Preference Stock standing in the names of the two Defendants as executors of the testator, by way of security for the repayment of the £1154 and interest, and these certificates now remained in the custody of the Plaintiffs. The Plaintiffs had lately requested the Defendants to sell so much of the £2500 railway stock as would discharge the debt of £1154 owing to the Plaintiffs, but the Defendants had refused to comply with the request on the ground that the loan was made to the Defendant *J. T. Thorley* personally, and must be discharged by him alone; whereas the Plaintiffs alleged that such loan was made by them to *J. T. Thorley* as executor, and that the deposit of railway stock was also made by him as such executor.

The evidence was taken *viva voce*, and it was proved that the Plaintiffs knew that *J. T. Thorley* was one of the residuary legatees of the testator, and would be entitled to above £9000; that the account at the bank was entered in the name *J. T. Thorley* as an executorship account; that *George E. Thorley* had been informed of the loan of £3000 to *J. T. Thorley*, and had signed the transfer of the stock by which that loan was paid off; and had afterwards signed the following document addressed to the Plaintiffs: "Follow

the instructions of Mr. *J. T. Thorley* as to the disposal of the proceeds of the sale effected on the 16th inst. of the undermentioned securities" (here followed a list of the securities which had been so transferred).

It was further proved that after the second advance made to *J. T. Thorley* by the bankers, *George E. Thorley* withdrew his authority for the disposal of the certificates of railway stock subsequently deposited by *J. T. Thorley* as security for the advance of £1154.

The Defendants had put in a counterclaim, asking for a declaration that they were entitled to credit for the £3874, as being improperly carried to the separate account of *J. T. Thorley*.

Bristowe, Q.C., and *W. Karslake*, for *Child & Co.*:—

We are clearly entitled to repayment of the advances made by us to *J. T. Thorley* for executorial purposes. It is proved that *J. T. Thorley* was permitted by his co-executor to take the acting part in the management of the testator's estate, and that he applied to us as executor for an advance for the express purpose of the executorship. We knew that he was entitled to at least £9000 as his share of the residue, and we were justified in making the advances, which did not exceed the sum to which he was entitled. Moreover, his co-executor, Mr. *George Thorley*, was aware that Mr. *J. T. Thorley* had borrowed the first £3000 upon securities deposited with the bankers, and had not only signed the transfer of the securities, so as to enable Messrs. *Child & Co.* to obtain the money, but had also signed that conclusive document—"Follow the instructions of *J. T. Thorley* as to the disposal of the proceeds." The proceeds were, as a matter of course, applied, at the direction of *J. T. Thorley*, in paying off the loan from the bankers. Yet it is to obtain repayment of that amount that the Defendants have put in their counterclaim. Then as to the other advances, Messrs. *Child* were justified in allowing *J. T. Thorley* to have the money for executorial purposes, when they knew it was so applied, and they are entitled to be repaid out of the estate of the testator.

Higgins, Q.C., and *Woodhouse*, for *George Thorley*:—

We maintain that the money advanced by the bankers was

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placed by them to the private account of *J. T. Thorley*. They knew it was derived from the estate of the testator, and although *George Thorley* sanctioned the sale of the securities, the object was that it should be applied for executorship purposes; whereas *J. T. Thorley* repaid the money to the bankers which he had obtained for payment of his own share in the residue, and his account at the bankers was overdrawn. The money was, in fact, transferred from the executorship account to the private account of *J. T. Thorley*.

There was nothing to justify the bankers in taking that course. The case of *Bridgman* v. *Gill* (1) is in our favour. There a fund was standing to the account of two trustees in the books of some bankers, who had notice that it was a trust fund, and it was held that the trustees might sue the bankers for having transferred it to the account of one of the *cestuis que trust* in payment of a debt due to themselves: *Wilson* v. *Moore* (2).

Then as to the second advance, there was a distinct withdrawal of authority by *George Thorley* for the bankers to make any further advances to *J. T. Thorley*, and although there is no evidence of *George Thorley* having shewn a distrust of his co-executor, that fact was sufficient to put the bankers on their guard.

Fisher, for *J. T. Thorley*.

MALINS, V.C.:—

I cannot help saying that this is, in my opinion, a most unjustifiable defence which is set up by these two executors against the claim which Messrs. *Child & Co.* have on the estate. I call it unjustifiable because I now have it in evidence from the Defendants' own witness, Mr. *John Thomas Thorley*, that at the time when the transaction as to the loan of the £3000, which is the main transaction in question, took place — whether I look upon it as an individual transaction, or whether I look upon it as a transaction as executor—he had an abundant interest to justify the borrowing of the money, inasmuch as at that time he had only received £5000 on account of his residuary share of the residue, which he

(1) 24 Beav. 302. (2) 1 My. & K. 337.

says is nearly £10,000, or certainly over £9000. Moreover, he has also sworn that he has not overdrawn his share, that his share is underdrawn, and further he swears that if he has overdrawn he is in a situation to pay the difference.

Therefore, what justification could there be for such a defence as this?

Before I enter into the particular circumstances of this case, I must state that Mr. *Woodhouse* proposed to cite authorities. I told him it was totally unnecessary. They have been mentioned, and to mention them is quite enough, because the law is perfectly clear, that if bankers, or merchants, or anybody else, have a debt due from a trustee, or an executor who is a trustee, and knowing that it is a mere private debt, apply, or allow to be applied, the estate of the testator, or a trust fund of any description, in payment of that private debt, in no way connected with the trust fund, they must repay all the money which is so applied. The great authority which is always referred to on that subject is the case of *Wilson* v. *Moore* (1). That was on the original hearing before Sir *John Leach*, and on appeal it is reported in the same volume affirming his decision. What is it? That was a case in which *Marryat & Co.*, great merchants of those days—about forty-five years ago—had customers with whom they had carried on large transactions, foreign correspondents, and those customers had become indebted to them in the sum of about £20,000. Those customers were executors of their father's estate, and *Marryat & Co.* had also a power of attorney which enabled them to act for the executors, and with full knowledge that the debt was the debt of the individual, they sold off a sufficient part of the testator's estate to repay themselves their debt. A bill was afterwards filed against them by the residuary legatees to compel them to refund this payment. The decision was that they had received the money with the knowledge that it had been misapplied, and they were therefore decreed to repay all the moneys received with interest and costs.

That being the general rule, that principle is attempted to be applied by the Defendants in this case. What warrant is there for it? Look at the transaction as it is stated by Mr. *Fane* on

(1) 1 My. & K. 337.

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the part of the Plaintiffs, and by the Defendant, Mr. *J. T. Thorley*, in the account which he has given of his own transactions. It appears that Mr. *Fane* was acquainted with Mr. *J. T. Thorley*, who was frequently in the habit of visiting at his house. He seems to be a gentleman of education, but it is perfectly clear he was not a rich man but rather the contrary, and it was communicated to Mr. *Fane* that the uncle had made him one of the residuary legatees, and his share in the residue would be about £10,000.

The transaction which I have to decide upon took place on the 17th of June, 1878. It is agreed on both sides that up to that day Messrs. *Child & Co.* had had nothing whatever to do with the estate of *George Thorley*, the testator. They had had no deeds in their possession. They had had no connection with it whatever, nor had they with *J. T. Thorley*. Although he was acquainted with Mr. *Fane*, he had no banking account opened, and had had no transactions whatever before that time. Being thus acquainted with Mr. *Fane*, one of the senior members of Messrs. *Child & Co.*, he goes to the banking house and, according to his own statement, asks Mr. *Fane* to do him a great favour. I think the whole thing may be decided on his evidence. He says: "Mr. *Fane* was aware I was an executor and a beneficiary under the will of my uncle, he had congratulated me at his own house some time before; I think I had stated that I expected about £10,000 under the will." Now as to the transaction, here is his account of it. "I told him I wanted £3000 at once. I told him the only securities I could give were certificates standing in the joint names of my co-executor and myself. He asked me if the payments I wanted to make were strict payments out of the estate." That I understand to mean payments that he was strictly entitled to make out of the estate. "I told him yes. I told him I wanted a considerable sum which I had paid for the estate." That, he said, was between £400 and £500. Then he said, "I want a considerable sum for myself in payment of my part of the share and also to repay myself the few hundreds which I had paid out of my own money for the estate. Mr. *Fane* then said he would be very happy to oblige me, and advanced me the money. Nothing was said about the amount of my share at that time." So that he told Mr. *Fane*, according to the evidence he has given, that it was strictly for the purposes of

the estate. Now, those being the purposes, what was his position at that time? There were two executors, and Mr. *George Thorley* this morning, in answer to a question I put to him, admitted that he left the management of the estate to his co-executor, and that Mr. *J. T. Thorley* was the acting executor. Does he go beyond his authority in receiving money for the purposes of the estate? Is it necessary that two executors should concur in every act which is done regarding the estate? Then having so represented that he was an executor, although he had not opened the account as executor, but in the name of *John Thomas Thorley*, still it was a transaction as executor. As executor he borrowed the money, and the estate must repay it, even if it had stood there without anything more being done. But what does he do more? The co-executor having left the transaction of all the business to him, he raises money for various purposes connected with the estate. What is the conduct of the co-executor? Here I have the documents signed by him. Supposing a man does a thing professing to be one of two executors, and the transaction is brought to the attention of the co-executor, what would you expect would be his act? If he objected to the transaction he would repudiate it at once. What is the evidence of Mr. *George Thorley?* He says Mr. *Fane* told him of the advance of the £3000—did he object? I have it most expressly from him that he did not on that occasion, or on any occasion whatever, by word of mouth or by letter, intimate to Messrs. *Child & Co.* the slightest dissatisfaction with the conduct of his co-executor, or any distrust in his integrity in the management of the estate. So far from that, let us see what took place. On the 17th of June, 1878, there was a carefully drawn-up document in the handwriting of Mr. *J. T. Thorley* at the time he deposited all these documents. "I hereby undertake to deposit with Messrs. *Child & Co.* the before-mentioned certificates of stock and to obtain a transfer of the same into their names unless the loan of £3000 be discharged before one month from this date." Mr. *Fane* believed his statement, and the statement turns out to be true, that he had borrowed it strictly and entirely for the purposes of the will, and he undertakes, if the money is not paid within one month, to obtain a transfer of the stock. It seems that Messrs. *Child & Co.* did not insist upon the strict performance

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of that contract, and did not require the payment at the expiration of a month, for I find that nothing was done in the matter until January, 1879, that is, seven months afterwards. What does he do then? He directs them to sell the stock deposited in their hands, and he gives this document of the 15th of January, 1879, to Messrs. *Child & Co.*: "Sell out of the joint names of *Geo. E. Thorley* and *John T. Thorley* fourteen hundred *South Eastern Railway* 5 per Cent. Perpetual Debenture Stock," and it includes all the stock in question which has been sold for £3874. Messrs. *Child & Co.* knew perfectly well that that order could not be obeyed, and that the order of *John T. Thorley* alone could not be acted upon, therefore Mr. *Fane* says, I drew out a document for the signature of the co-executor, *Geo. E. Thorley*. It was taken to him, and it was returned to me signed, and is in these terms: "Follow the instructions of Mr. *J. T. Thorley* as to the disposal of the proceeds of the sale effected on the 16th instant of fourteen hundred pounds *South Eastern Railway* Debenture Stock." Then he enumerates the same things that are included in the order of Mr. *John T. Thorley* of the 15th of January. There is a further document in the same words as to the rest of the securities, and that is signed again by *G. E. Thorley*. If there had been any doubt about the transactions having been originally for the benefit of the estate, all that is at once removed by the co-executor signing this authority. And he also executed the transfer by which Messrs. *Child & Co.* were able to sell the stock, and the stock was sold and the proceeds carried to the credit of the account on the 6th of February, 1879.

Now, therefore, are parties to come here and discuss whether one executor can act without the authority of the other? No doubt he can to a certain extent. Such a question does not, however, arise here, because all that *J. T. Thorley* did alone was absolutely confirmed by this authority signed by *George Thorley*, and the transfers completing the transactions commenced by *J. T. Thorley;* and Messrs. *Child & Co.*, who had acquired an equitable title to the assets, then obtained a legal transfer, which they executed by selling the stock and applying the proceeds in payment of the debt of £3000 and interest, which had been borrowed on the 17th of June, 1878. But it does not stop there, for upon the

15th of January, 1879, Mr. *Fane* being absent, *J. T. Thorley* sees Mr. *Evans*, one of the junior partners of the firm, and he tells Mr. *Evans* that he wants £700 for the purposes of the will. Mr. *Evans* believed that statement made by Mr. *Thorley*, as he would naturally believe a gentleman in his position in life, and he believed that *J. T. Thorley* had authority, which he might well be supposed to have, and, accordingly, he advanced him the £700. But even there it does not stop, for afterwards, on the 22nd of January, a further sum of £1154 was advanced by Mr. *Fane* on the representation by *J. T. Thorley* that he wanted the money to pay the legacy duties. On that occasion Mr. *Fane* was very cautious, for he had the cheque drawn to the order of Mr. *Wood*, the solicitor of the estate, a solicitor at *Woodbridge*, and the cheque was sent to Mr. *Wood* for his indorsement. It was crossed "The *Bank of England*," where it must go for the payment of legacy duty, and indorsed by Mr. *Wood*, and that money actually went to pay the legacy duties. Now, a transaction more simple it would be difficult to imagine. The act of one executor confirmed by the other. But then comes the grave charge that Messrs. *Child & Co.* were actually guilty of the impropriety of transferring the money, the produce of the sale under the authority of *J. T. Thorley* and *George Thorley*, to the private account of *J. T. Thorley*. What was the private account of *J. T. Thorley?* The private account is this: an account not headed as a private account in the books, but the account which he had opened for the purposes of the estate on the 17th of June, 1878. Why did they transfer it to this account? Had they not got these authorites from Mr. *G. Thorley*: "Follow the instructions of Mr. *J. T. Thorley* as to the disposal of the proceeds of the sale effected on the 16th instant." That is, do whatever he tells you to do. What did he tell them to do with it? He told them by the letter of the 10th of February, "Transfer to my private account the balance standing to the credit of my executorship account, and reduce my advances by the amount so transferred." Upon that they followed the instructions of the co-executor. The defence set up is that this is a private account, and therefore they are not entitled to charge the debt of the private against the executorship account. The thing utterly

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fails in its facts, and has no approach to the circumstances of the cases which have decided that an individual debt of a trustee cannot be paid out of the trust estate, because here it was the action of both executors—originally of one acting strictly in pursuance of the authority which his co-executor had given to him to act in the meantime for the estate generally. I say, therefore, that when he contracted the loan on the 17th he was acting within his discretion and duty, because he was acting as he was authorized to act by the co-executor. Nothing can be more clear, in my mind, than this, that all that was done here was done by the authority of both executors. It is shewn, not only by parol evidence, but by the written documents under the hand of *George Thorley*, and nothing whatever was done by Messrs. *Child* which was not warranted by the written documents in the transaction and the evidence which has been given.

As I have already said, the transaction was not irregular, was not improper. It was not irregular for the bankers to advance money to one of two executors for the purposes of the will, if they were led to believe it was for the purposes of the will, and moreover the co-executor, being informed of all the facts, deliberately confirms them and never makes the slightest complaint of what his co-executor has done. *George Thorley* said he did countermand the second authority to sell because the stock had not then been sold, but he did not countermand the first because he considered that the proceeds had been appropriated. How had they been appropriated? He knew perfectly well that they had been appropriated in payment of that debt, and he had sanctioned that. He knew it had been raised for the purpose of the estate, and that he could not with any propriety repudiate or attempt to repudiate what had been done.

The defence, therefore, set up is, in my opinion, to the last degree unjustifiable; and I am very sorry that I am not armed with the power of making the persons who set it up indemnify Messrs. *Child & Co.* by paying their costs as between solicitor and client.

The counter-claim will be dismissed with costs, and there will be a declaration that the Plaintiffs have a lien upon the £2500 *North Western* stock which was deposited by *J. T. Thorley* to

secure the ultimate balance due to them. The costs will be taxed, and the Plaintiffs will be entitled to mortgagees' costs properly incurred, as it is a mortgagee's suit; and after the payment of costs the balance will be paid over to the executors. It will be more formal to take an account of what is due to the Plaintiffs for principal, interest, and costs as mortgagees, and the Plaintiff will have a lien for those costs, and also the costs of the suit, all of which will be added to the Plaintiffs' security.

Solicitors: *Finch, Jennings, & Finch; Combe & Wainwright.*

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[1875 C. 228.]

Sale of Infant's Property—Discretion of Trustees—Large Increase of Income—Refusal of Court to order a Sale.

Two trustees having power to sell the freehold property of an infant at the request of the guardians, and one trustee having declined upon such request to exercise the power of sale, the Court refused to control the discretion of the trustees by ordering them to sell the estate—there being no absolute necessity for raising money and the existing income being sufficient to keep down the charges upon the estate—notwithstanding that the effect of the sale would be to increase very considerably the income of the property.

THIS suit was instituted in 1875 for the administration of the estate of the late *George Charles*, second Marquis *Camden*, and the case now came on upon an application to the Court to direct the trustees of the will to sell a portion of the property forming the "*Wildnerness* estate," situate near *Sevenoaks*, in *Kent*. The testator by his will, dated in August, 1856, devised his several estates in *Kent*, *Sussex*, *Brecknock*, *Middlesex*, or elsewhere, to his trustees, *Jermyn Pratt* and *Herbert Hasley Murray*, to the use of his son, the Earl of *Brecknock*, for life, and after his decease to the use of his first and other sons successively in tail male, with remainder to the use of his second son, Lord *George Murray Pratt*, for life, and after his decease to his first and other sons in tail male; remainder to his third son, Lord *Charles Robert Pratt*, for life, and then to his first and other sons in tail male, with

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divers remainders over. The testator died in August, 1866, leaving his three sons and eight daughters surviving. His eldest son, the Earl of *Brecknock*, succeeded to the estates, and died in May, 1872, leaving two children, namely, the infant Plaintiff, *John Charles*, the present Marquis *Camden*, who was born in February, 1872, and one daughter. The will provided that it should be lawful for the said *J. Pratt* and *H. H. Murray*, and the survivor of them, and the executors and administrators of such survivor, at the request in writing of the person who should for the time being be in the actual possession of or entitled to the receipt of the rents and profits of the estates, or in case the person or persons who if of full age would for the time being be so entitled as aforesaid should be under the age of twenty-one years, then, at the request in writing of the guardian or guardians for the time being of such person or persons, to convey by way of absolute sale all or any of the estates thereinbefore devised and the inheritance thereof in fee simple in manner therein mentioned, and contained a declaration that they the said *Jermyn Pratt* and *Herbert Hasley Murray*, and the survivor of them, and the executors and administrators of such survivor, should apply the money to arise by such sale either towards the discharge of the principal sums of money, if any, which should then for the time being be a charge upon or affect the estates for the time being subject to the limitations thereinbefore contained, or in the purchase of such other hereditaments as therein specified in manner therein mentioned.

Since the death of the testator one of the trustees, *J. Pratt*, had died, and another trustee, Mr. *Hope*, had been appointed a few months ago in his place. The guardians of the infant Marquis originally appointed by the Court were the Marchioness of *Camden*, the widow of the testator and the mother of the infant Plaintiff, the Duke of *Marlborough*, and Mr. *Stewart*. Mr. *Stewart* had since retired, and Lady *Camden* having intermarried with Captain *Green*, her husband was by an order of the Court added as one of the guardians.

The trustees of the will had been called upon by the guardians of the infant to dispose of the *Wilderness* estate, being part of the property comprised in the will of the testator; but Lord *George Pratt*, the second son of the testator and the next tenant for life

expectant upon the death of the present infant Plaintiff, opposed the sale. One of the trustees, Mr. *Murray*, also opposed the sale; but the other trustee, Mr. *Hope*, consented, but did not appear by counsel.

The evidence in support of the application was that the present rent paid for the *Wilderness* estate, which consisted of a mansion-house and about 500 acres of land, was £1700, and that if it was sold the probable price that would be obtained for it would be £190,000, consequently there would be a very considerable increase of income, amounting to about £4000 per annum; that this increase of income would at the present time be of great importance, since it was found very difficult to keep down the existing charges upon the property, and that it would be more beneficial for the infant upon arriving at twenty-one years of age to have the accumulations of income accruing during his minority. There was also evidence of surveyors that this was a very favourable time for the sale of the property, and that in all probability, if the infant should be desirous of selling it upon attaining his majority, the property would not fetch nearly so much money.

The evidence for the Defendant went to shew that there was sufficient income now derived from the whole property of the testator to pay all the existing charges, and that the estate was as likely to fetch the money at which it was now valued, when the infant should attain his majority, as at the present time.

Glasse, Q.C., and *Alexander*, for the infant Plaintiff and for his guardians:—

Under the power of sale in the will of the late Marquis *Camden* the trustees are empowered to sell any portion of the property at the request of the person in possession, or of his guardians in case of infancy. These guardians have in writing requested the trustees to sell the estate called "*The Wilderness*," and it is difficult to discover why there should be any objection to it. There is at present a large and suitable mansion house upon another of the estates, called the *Bayham* estate, not very far from "*The Wilderness*." The expenditure upon building that house was sanctioned by Act of Parliament in 1869, and it has necessarily reduced the income of the property, and it is shewn by the evi-

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dence that by a sale of this estate for building purposes there will be a very considerable increase of income, and all the guardians concur in thinking it most desirable that the *Wilderness* should be sold. The only possible objection to it is a sentimental one—that an estate which has been for many years in the family should not be parted with; but this sentimental luxury will cost £4000 a year, and the question is whether the infant's estate is to be sacrificed for the sentimental objection raised by a gentleman who may never become entitled to the property.

Bristowe, Q.C., and *Cust*, for Lord *George Pratt*, whose views in opposing the sale were also entertained by the other members of his family:—

We do not deny that one of our reasons for opposing this sale is a sentimental one, that the estate has been in the possession of the family ever since the time of *Charles* II., and we think that, unless there is strong necessity for parting with the estate, it should not be sold. Here there is no such necessity, since the present income is sufficient to meet all the expenses and to leave a small surplus. We admit that a larger income would probably be obtained, but there are very many persons who would prefer keeping an old family estate to having a larger income; at any rate, it should be left to the infant on attaining twenty-one to decide for himself. There is no ground stated for the sale of this property except an increased income, and that is not sufficient for the Court to act upon. The rule of the Court is laid down in *Chambers* on Infancy (1), "that no guardian or trustee shall be allowed to alter or change the nature of an infant's estate, whether realty into personalty or personalty into realty; in order that those who come into succession may find the property in the same state;" and for that rule the case of *Rook* v. *Warth* (2) is cited. The same principle is laid down in *Calvert* v. *Godfrey* (3), "that the Court has no authority to sell the real estate of an infant or to convert it, upon the notion that it would be beneficial to the infant himself or to himself and others." In *Seton* on Decrees (4) the rule is stated in similar terms.

(1) Page 535.
(2) 1 Ves. Sen. 460.
(3) 6 Beav. 97.
(4) 4th Ed. vol. ii. p. 740.

But here the trustees are not agreed as to the propriety of selling the estate, and Mr. *Murray*, the trustee appointed by the testator, objects to the sale. In such a case as this the Court will not compel the trustees to exercise a power which is not compulsory upon them. In *Tabor* v. *Brooks* (1) your Lordship said, "As a general rule the Court will not interfere with the discretion of trustees where it is fairly and honestly exercised," and you referred to *Costabadie* v. *Costabadie* (2) and in *In re Beloved Wilkes' Charity* (3) in support of that principle. In *Tabor* v. *Brooks* you did not interfere with the discretion of the trustees, but there the words of the power were certainly stronger than they are here.

Glasse, in reply, read an affidavit to shew that the father of the present infant Marquis contemplated selling the *Wilderness* estate to pay off the charge incurred in building a mansion-house upon the *Bayham Abbey* estate, and commented upon the considerable increase to the property by the accumulation of £4000 per annum for the thirteen years intervening before the present Plaintiff should attain his majority.

MALINS, V.C.:—

This matter has been argued at great length, and I am now in a position to decide this very painful family dispute.

The facts that have given rise to the dispute are these. The second Marquis of *Camden* made his will and died in 1866, and he did what is usual under such circumstances, he made his eldest son tenant for life, with remainder to his first and other sons in tail male, with remainders over to his younger sons in succession and their issue in tail male, and so forth. The result of that is, that he was succeeded by his eldest son, who died in 1872, leaving an infant son born three months before his death, who is the present Plaintiff, and a daughter. On this occasion I have nothing to do with the daughter, because she is otherwise provided for. Shortly after the death of the last Marquis I appointed the mother and the Duke of *Marlborough*, and another gentleman who has retired, guardians of the infant, who is now eight years

(1) 10 Ch. D. 273, 277. (2) 6 Hare, 410.
(3) 3 Mac. & G. 440.

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of age and has become tenant in tail in possession of all the family estates—the *Bayham* estate, the *Wilderness* estate, the *Camden Town* estate, and the *Breconshire* estate. Then, upon the marriage of the Marchioness, an application was made to me, and I adopted the usual course of the Court, that where the mother of an infant, being guardian, marries again, if she marries in a suitable manner —that is, a gentleman in a proper position of life and of irreproachable character, a gentleman fit to be guardian, it is the usual course of the Court to associate the husband with the wife as guardian, and therefore, being satisfied of all these facts, I appointed Captain *Green*, who was married to the Marchioness, joint guardian with her. I have also in Chambers allowed the Marchioness, for the maintenance of herself—and the maintenance of the infant—not for herself alone, because she has a jointure of £2000 a year, but for the maintenance of the infant and the support of the family mansion, *Bayham Abbey*—£6000 a year. I am sorry to find that that £6000 a year has not been regularly paid; but it is admitted now that she is paid up to the 4th of November. She cannot, therefore, complain at the present time, though she has had reason to complain sometimes of the allowance being in arrear.

It appears that under the authority of an Act of Parliament £50,000 has been expended in erecting a suitable mansion on the *Bayham Abbey* estate, and the house is unquestionably a suitable residence for the family.

Now the Marchioness, having the allowance that I have referred to, occupies the mansion-house, *Bayham Abbey*, and it happens that there is another estate in the county of *Kent*, at a distance of about twenty miles, called "*The Wilderness*," which is at *Sevenoaks*, producing, as appears by the evidence, at the utmost, after all the outgoings are paid, £1700 a year, and it has been proposed on the part of the guardians of the infant that this neighbouring estate, the *Wilderness*, should be sold for the purpose of augmenting the income of the family. Now, with regard to the income, there seems a little uncertainty as to what the precise amount of it is, but on the whole I think I must come to the conclusion that there is enough—not much to spare—but enough to pay this allowance of £6000 a year, the Marchioness's jointure

of £2000 a year, and the interest on the portions of the younger children, and to keep down all the charges.

But then this remarkable state of things is presented: the *Wilderness* estate produces only £1700 clear, and I have a concurrence of evidence that if sold it would produce £190,000. Now, if the estate were turned into money, and the money invested in consols at par, as they are now, until suitable investments could be found, the income would be increased from £1700 to £5700; in other words, the result of the sale would be to increase the income by £4000 a year. The estate is undoubtedly one, in my opinion, that does require an increase of income, and I think it would be desirable that the income should be increased, though I do not think it is absolutely necessary, because if during the infancy of the Marquis, which must last for nearly thirteen years longer, there is enough to keep down the charges and to hand over the whole of the estates as they were left by his grandfather, I cannot help thinking that it is the duty of the Court to keep the estate in its integrity, unless there is some absolute necessity shewn for selling it. It is not absolutely necessary to sell to increase the income of the estate, since the income is at present sufficient to keep down the charges. It is a matter of judgment and a matter of taste. One man would say, "I would rather have £5700 a year than £1700—I would rather have the money than the land;" and another would say, "If I have enough to live upon, so long as I can make the two ends meet, I would rather have the land, and no amount of money can compensate me for the loss of an ancient estate on which my ancestors have resided, and in which many have been buried;" and therefore many men, and I confess I am of that class, if they had money enough, would rather keep the land than have any money they could substitute for it. Upon all hands, I think it is agreed that the *Wilderness* estate is a very good estate. The mansion-house and park is occupied by a gentleman of distinction, Sir *Charles Mills*, under a lease that will expire within a year, and if the estate were put up for auction, he would probably give a very large sum for it—a great deal more than would represent £1700 a year income.

I have, first, the evidence of Mr. *Lofts*, taken in the year 1869,

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that the property would fetch £150,000 and £20,000 for the timber, that is, £170,000; and Mr. *Lofts* adheres to that opinion now. Then I have the opinion of Mr. *Driver*, that if the property were put up for auction now it would sell for £190,000, and I have the opinion of a gentleman whose opinion is entitled to equal consideration, namely, Mr. *Beadel*, who does not controvert the opinion of Mr. *Driver*, that it will fetch £190,000; but while Mr. *Driver* thinks it would probably fetch more now than it would at a future time, Mr. *Beadel* thinks it is very likely to fetch a higher price by postponing the sale than selling at the present time. That is the only difference of opinion that exists. They both concur in thinking that the probable produce of the estate will be £170,000 plus £20,000 for timber, that is, £190,000, producing, as I have already said, £5700 a year instead of £1700.

Now that is a state of things under which one would rather suppose all members of the family would concur in, seeing that it is expedient that the income should be so increased, but I am bound to consider not only the pecuniary interests but all the interests of the infant. I must, as well as I can, regard all the surrounding circumstances, and I must look at what his present interests are and what his interests may be hereafter, and, as far as I can, give him the opportunity of carrying his own views into execution. Now I have already said the infant is tenant in tail in possession, therefore the very day he attains his majority he will be able to execute a disentailing deed of all the estates, and do as he likes with them. He may make his will the same day that he comes of age, leaving them away from the family if he thinks fit, although he would in all human probability do as all persons in his position would do, annex them to the title as far as he could; still he is the absolute master of the situation. Mr. *Glasse* says that Lord *George Pratt*, who is the next in succession, and who will, should anything happen to the infant, immediately succeed to the title, does not express any affection for this estate, but comes most strongly to oppose the sale. Why is it? If this estate produces £5700 a year instead of £1700, the money must be invested, and if Lord *George Pratt* succeeds to the estate he must necessarily succeed to the enjoyment of the interest of the money. He therefore has before him, besides the possibility of the succession,

the temptation of a very large increase of income; but he says, "I would rather have the land if I succeed to the title than I would have the money"; and if he has the land, he will, under the powers of the will, be only tenant for life, not like his nephew, tenant in tail, and he would only be tenant for life with remainder to his sons successively in tail male. But as he has no son, he will, therefore, have to wait a very long time before he or his son can do that which the infant Marquis will be able to do here; therefore there is a money temptation to him, and that he resists, and says, "If I succeed to the title I would rather have the land than the money."

Now, under these circumstances, what are the powers which I have to deal with? The Marquis who created the estate tail, the father of Lord *George Pratt* and the grandfather of the infant, has authorized his trustees, at the request of the guardians, to sell these estates or any part of them. I have evidence before me that the guardians do request a sale. It is not imperative on the trustees to sell, because, though the guardians must request before they can sell, they are not bound to sell when the guardians do request. Now the guardians having requested them to sell, what do the trustees do? There are two of them: one is Mr. *Herbert Murray*, who was appointed a trustee of the will of the testator, who died in 1866. He is the surviving trustee, and is a person in whom the testator placed confidence. Who is the other trustee? A gentleman appointed in my Chambers of the highest position and respectability—Mr. *Hope*. Mr. *Murray* is a gentleman, I may state, about fifty years of age—a man of experience, having long known these estates; whereas Mr. *Hope*, the other trustee, was appointed about a month ago, a young man, who, although his father, Mr. *Beresford Hope*, has estates in the neighbourhood, and from that circumstance he has a very good acquaintance with this estate, yet I cannot consider him so well qualified to exercise a judgment upon the subject as Mr. *Herbert Murray*, who has been acting as trustee ever since the death of the testator in 1866, and has instructed counsel to say that he opposes the sale. Now, then, if the trustees do not agree on the subject, as they do not, and it is not imperative upon them to sell, and certainly Mr. *Hope* cannot sell without the concurrence of Mr. *Murray*, and Mr.

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Murray will not concur in the sale unless he is obliged, is there any case shewn for me to control these trustees? That is the simple question. They will not sell unless they are controlled. Is a case established for my control? That the Court will exercise a control over trustees on a proper occasion, and will oblige them in certain cases to do that which they themselves are unwilling to do, admits of no doubt. In certain cases—not in all cases, because if their discretion is absolutely uncontrollable I should not interfere—that I have recently decided, after very full consideration, in a case of *Tabor* v. *Brooks* (1), where there was an absolute discretion in trustees; although they exercised their discretion in a manner most unsatisfactory and in a way I entirely disapproved of, yet I felt myself bound to come to the conclusion, on the authorities and principles of the Court, that I could not control them where there was no *mala fides*, and where they were honestly exercising their powers. Now, if Mr. *Murray*, the surviving trustee appointed by the testator, in the honest and *bonâ fide* exercise of his discretion, thinks that a case is not established for the sale of these estates, on what principle am I to control him? I certainly should only be justified in doing so, on being satisfied that an absolute necessity exists for a sale of this infant's estate. I have propounded the principle on several occasions in course of the arguments, not only now but on the 4th of August also, when the matter was before me, viz., that the Court will not sell the real estate of an infant unless there is an absolute necessity for it. With regard to the future, I can very plainly see from the facts I have stated, that the pecuniary interests of the infant would be promoted by selling the estate now for £190,000; but is there an absolute necessity for the sale? There is no absolute necessity to sell if there are means of keeping up the family residence and paying all charges, jointure, and so on, out of the income which exists. I am satisfied, on the whole, that with a little struggle there is enough, and that no necessity has been established for a sale.

With regard to the future, I may assume that this infant when he comes of age may, like his uncle Lord *George Pratt*, prefer the land to the money. If I sell this estate, or compel the trustees

(1) 10 Ch. D. 273.

to sell it, he may think that it was the very place he would have preferred to live in if the choice had been left him, and he might think he would have preferred it to *Bayham Abbey*. Ought he not then to have the opportunity of deciding for himself? The view I took of the matter in Chambers was that it should be left to the infant on attaining twenty-one to act as he thinks fit, and that is the view I now take. There is no overwhelming necessity shewn for the sale of the property. The case shewn is that more money will be produced, but money is not the only thing worth consideration. I cannot tell what this infant may think when he comes of age. All I can say is, that it is my duty to preserve his estate, and the estates of all infants, in the condition in which the ancestor has left them, unless some overwhelming necessity is shewn for conversion. There is no such overwhelming necessity here—there is quite enough for him, and if there should not be enough to keep up the family mansion, the interest of the infant may be considered in letting the mansion for thirteen years, and the family residing in a residence more suited to their means. But, considering that the Marchioness has £6000 a year allowed her by the Court besides her jointure of £2000 per annum, in addition to something for her daughter, and Captain *Green* may have some means of his own, I cannot help thinking that the Marchioness is abundantly provided for without my selling the estate in order to increase the allowance to her, which I cannot disguise from myself is one of the objects. The Marchioness having married again, is no justification for calling on the Court—if she has married a man who cannot contribute to the general fund—to make her a larger allowance. Therefore I come to the conclusion that a case for the sale of the estate has not been established. I think I should be wholly unjustified, when I have a gentleman in the position of Mr. *Murray*, a trustee appointed by the testator, in whom the testator himself had confidence, in controlling him, because his co-trustee of a month's duration thinks it would be expedient, and because the Marchioness, with the view, I see very plainly, of increasing her income, wishes it. I think the case wholly fails in establishing the necessity for a sale. So far from the late Marquis having desired a sale of his property, I cannot help thinking that he was desirous of its preservation, because in

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1869 he went to Parliament to raise £50,000, to be repaid by annual instalments, to rebuild *Bayham Abbey*, to pull down the old abbey, which was small and inconvenient, and to spend £50,000 in building a new house. If he wanted a sale of the estate, why not upon that occasion have gone to Parliament for authority to sell the property—to sell the *Wilderness*, and out of the proceeds spend £50,000 in building the mansion, and let the residue be invested, because it would have fetched £170,000 at that time, according to the evidence of Mr. *Lofts*, and then they might have taken the £50,000 away to build the mansion, and so obviate all necessity for borrowing, and £120,000 would have been left to invest. The late Marquis never took any step to sell the *Wilderness*, although the Marchioness says he contemplated it. I see the receiver, Mr. *Roberts*, says £10,000 is wanted to put the farm buildings and farm houses into repair. Is that any reason why I should raise £190,000? If a case is shewn to me in Chambers of £10,000 being wanted to put the estate into a thoroughly maintainable position, I have no doubt Mr. *Murray* and the other trustee will both concur in selling so much as may be necessary for that purpose; but why, because £10,000 is wanted for a purpose, I should sell property to the amount of £190,000, I do not see.

Upon all these grounds, being partly a matter of money and partly a matter of sentiment, I am bound to have regard to the interest of the infant; and, having regard to his best interest, I feel an overwhelming conviction that, whatever be the result, the estate will not be less valuable when he comes of age than it is now. He can keep it if he cares about it, or he can sell it; it is a question for him to decide, and for his decision I intend to leave it. Therefore, the application that I should make an order for sale upon these trustees, who will not sell otherwise, is, in my opinion, not sustainable. The order for a sale must consequently be refused.

Solicitors: *Capron, Dalton, Hitchens, & Brabant; Farrer, Ourry, & Co.; Newman, Jeans, & Co.*

In re HILL'S TRUSTS.

V.-C. M.

1880

Dec. 3.

Charity—Mortmain—Void Legacy—Apportionment—Charge on Land—Proceeds of Sale.

A testator gave a share of his residuary personal estate to charities. His residuary estate consisted of a legacy from another testator payable out of the proceeds of that testator's real and mixed estate and pure personal estate:—

Held, that the bequests to the charities must be apportioned according to the values of the real and mixed estate and personal estate of the first testator, and that the bequests failed as to the portion attributable to the real and mixed estate, but were good as to the portion attributable to the pure personal estate.

JOSIAH ROSS HILL by his will devised and bequeathed all his real and personal estate to trustees upon trust for sale and conversion, and for investment of the proceeds; the annual produce to be paid to *Louisa Hill* during her life, and after her death (in the events which happened) the trustees were to convert the trust premises into money, and to apply the money (amongst other things), as to £3000, to pay the same to *Jacob Little Hill* for his own use, and as to £2000, upon trust, in the events which happened, for *Jacob Little Hill* absolutely. *Josiah Ross Hill* died in 1836.

Jacob Little Hill by his will gave all his personal estate to trustees on trust for *Louisa Hill* during her life, and after her decease and payment of certain legacies, gave all his residuary personal estate and effects, and all parts and shares thereof of or in which he might either under the will of *Josiah R. Hill* or otherwise be possessed or entitled, unto trustees on trust to pay, assign, and transfer eight-twelfths thereof to certain legatees, and on trust to pay, assign, and transfer unto the treasurer for the time being of each of four charities, one-twelfth of such of his residuary personal estate and effects as he was by law entitled so to appoint and bequeath. And as to the residue of his personal estate and all his real estate, he devised and bequeathed the same to his two trustees for their absolute use and benefit as tenants

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in common. *Jacob L. Hill* died in 1862, and one of his trustees had died in his lifetime.

Louisa Hill, tenant for life under each of the wills and also sole next of kin of *Jacob L. Hill*, died in 1872.

A suit had been instituted for the administration of the estate of *Josiah R. Hill*, in which his real and leasehold estate was sold, partly before and partly after the death of *Jacob L. Hill*. The real and mixed estate had produced nearly £3000, and the pure personal estate was nearly £15,000, all of which had been brought into Court. The estate was apportioned amongst the legatees, and the amount to which *Jacob L. Hill's* estate was entitled in respect of his two legacies was certified to be £4994, which was paid out of Court to the executors of *Jacob L. Hill*, and was by them paid into Court under the *Trustees Relief Act*. It was the only residuary personal estate of *Jacob L. Hill*.

F. Shewring, the personal representative of *Louisa Hill*, now presented a petition for payment of four-twelfths of this sum.

C. Browne, for the Petitioner:—

The only fund for payment of the four-twelfths given to charities is the legacies under the will of *Josiah Ross Hill*, which are charged on his real estate; the legacies to the charities are therefore void, and either come to *Louisa Hill* as lapsed legacies, or go with the residue to the two trustees; and as one of them died in the lifetime of the testator one moiety comes to her as next of kin. At all events the bequest to the charities is void. It makes no difference that the testator might have received the legacies in money, if in fact he did not: *Brook* v. *Badley* (1); *Marsh* v. *Attorney-General* (2); *Shadbolt* v. *Thornton* (3); *Ashworth* v. *Munn* (4).

J. Pearson, Q.C., and *Dibdin*, for the charities:—

The state of facts in *Brook* v. *Badley* appears in the report of the case before the Master of the Rolls (5), and it is clear that there was a direct charge on the land. It is absurd to say that

(1) Law Rep. 3 Ch. 672.
(2) 2 J. & H. 61.
(3) 17 Sim. 49.
(4) 15 Ch. D. 363.
(5) Law Rep. 4 Eq. 106.

if a testator had a large personal estate, a legacy to a charity charged on all his estate would be void because he happened to have a piece of land worth, say £100. But in fact this property is converted by *Josiah R. Hill's* will, and *Jacob L. Hill* takes it as personalty. Suppose the land had all been sold, and the proceeds invested in the funds, would the legacies fail? In *Brook* v. *Badley* the trust for conversion did not arrive until after the death of the tenant for life, and therefore no valuation or apportionment could have been made.

Stock, and *Horsbrugh*, for other parties.

C. Browne, in reply.

MALINS, V.C., after stating the facts of the case, continued:—

The personal estate here is of the value of about £15,000, whilst the real estate is of less than £3000; it is therefore clear that a legacy of £5000 could not be paid out of the real estate, for if the testator had charged the whole on the real estate, £2000 would have been unprovided for. It is clearly the law that a charitable legacy charged exclusively on realty is wholly void, and it has even been decided that a debt secured by a mortgage of land cannot be given to a charity. Accordingly, in the case of *Ashworth* v. *Munn* (1), I held that the interest of a testator in partnership property was an interest in land as far as it comprised money arising from the sale of real estate, and that the bequest of it to a charity was void, and my decision was affirmed on appeal.

Suppose that there was a legacy of £5000 to a charity, and that the real estate had been worth £100 only, that would leave £4900, and why should that not be paid because the legacy failed as to £100? It appears to me that the decision in *Brook* v. *Badley*, both before the Master of the Rolls (2) and the Lord Chancellor (3), proceeded on the assumption that the legacy of £3000 was wholly charged on land, but why in that case there should not have been an inquiry how much was charged upon realty and how much upon personalty, I cannot perceive.

(1) 15 Ch. D. 363. (2) Law Rep. 4 Eq. 106.
(3) Law Rep. 3 Ch. 672.

V.-C. M. 1880 *In re* Hill's Trusts.

Now here the legacies would have to be partially paid out of the real estate. As to that part, therefore, they fail, but are good as to the rest.

Cur.:—The Court being of opinion that the legacies to the charities fail only so far as the fund coming under the will of *Josiah Ross Hill* was derived from the proceeds of land or of personalty savouring of land, apportion the fund accordingly; tax and pay the costs out of the fund, and pay one-twelfth portion of the fund derived from pure personalty to each of the charities.

Solicitors: *A. J. Day; Bridges, Sawtell, & Co.*

V.-C. M. 1880 *Dec.* 3.

CLARKE *v.* CHAMBERLIN.

[1860 C. 126.]

Protector of Settlement—Trustees—Death—Tenant for Life—3 & 4 *Will.* 4, *c.* 74, *s.* 22.

The trustees of the real estate under a will were appointed also protectors of the estates tail created by the will. They all died, and new trustees of the real estate were appointed by the Court:—

Held, that the tenant for life had become protector of the settlement, and that he and the first tenant in tail could convey.

Elizabeth Foulsham, by her will, appointed *E. P. Clarke* and *A. Taylor* trustees thereof, and she devised large estates in *Norfolk* to the use of *Alfred John Norman Chamberlin* for life, with remainder to the use of *E. P. Clarke* and *A. Taylor*, upon trust to preserve contingent remainders; with remainder to the use of the first son of *A. J. N. Chamberlin* and the heirs male of the body of such first son; with remainders to the use of his second, third, and every other son successively in tail male, with divers remainders over. And the testatrix gave the residue of her personal estate to her trustees, upon trust to invest the same in the purchase of land, and to hold the land upon the same uses and trusts as were declared of the *Norfolk* estates. And the testatrix appointed *E. P. Clarke* and *A. Taylor* to be protectors of every estate tail created by her will, and she made provisions for the

appointment of other persons to be protectors in the place of *E. P. Clarke* and *A. Taylor* in case they should die. By a codicil the testatrix appointed *A. Ward* to be a third trustee and protector. The testatrix died in September, 1857, and this suit was instituted for the administration of her estate.

By an order made in May, 1874, it was ordered that *M. Collins*, *J. G. Balls*, and *H. Snowden*, should be appointed trustees of the will, so far as related to the real estate in *Norfolk*, in substitution for the three trustees appointed by the will and codicil, who were all dead; but the new trustees were not thereby appointed protectors of the settlement.

By a deed dated the 13th of July, 1880, and duly inrolled, and made between *A. J. N. Chamberlin* of the first part, *R. P. Chamberlin* (his first son who attained the age of twenty-one years) of the second part, and two trustees of the third part, after reciting their desire that the real and personal estate devised and bequeathed by the will of *Elizabeth Foulsham* should be disentailed, and that it was apprehended that *A. J. N. Chamberlin* was then protector of the settlement, or that there was then no person who was the protector thereof, It was witnessed (amongst other things) that *A. J. N. Chamberlin* and *R. P. Chamberlin* assigned to the two trustees all the personal estate bequeathed by the will, to hold the same discharged from all estates tail to such uses as *A. J. N. Chamberlin* and *J. P. Chamberlin* should appoint. By another deed they appointed the same to the two trustees upon certain trusts.

The father, the son, and the two trustees now presented a petition for the payment out of Court of certain sums of money which had arisen from the personal estate bequeathed by the will upon the trusts of the *Norfolk* estate.

Bristowe, Q.C., and *Godlee*, for the Petitioners, submitted that the tenant for life was protector under sect. 22 of the *Fines and Recoveries Act*, 3 & 4 Will. 4, c. 74; and if not, then, as all the protectors appointed by the will were dead, the Court had power under sect. 33 to concur in disentailing. The only case was *Bell* v. *Holtby* (1).

(1) Law Rep. 15 Eq. 178.

V.-C. M. 1880 CLARKE v. CHAMBERLIN.

Langworthy, for the new trustees appointed by the Court, suggested that the will excluded the tenant for life from being protector, and that there ought to be protectors as directed by the will.

MALINS, V.C., was of opinion that in the events which had happened the tenant for life was protector, and payment out was ordered accordingly.

Solicitors for Petitioners: *Sharpe, Parkers, & Co.*, agents for *Stanley, Norwich.*

Solicitors for Trustees: *Whites, Renard, & Co.*

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In re LORD SOUTHAMPTON'S ESTATE. ALLEN *v.* LORD SOUTHAMPTON.

BANFATHER'S CLAIM.

Equitable Mortgage—Transferee—Confidential Solicitor—Constructive Notice.

A. deposited deeds with his confidential solicitor with a memorandum of deposit by way of equitable mortgage to secure the repayment of £3000. The solicitor handed the deeds and memorandum to *B.* as security for £2000, together with a memorandum signed by himself that the £2000, part of the annexed £3000 security, then belonged to *B.*, with interest at 5 per cent. The solicitor afterwards obtained a return of the deeds from *B.* upon an assurance that in lieu thereof others of equal value should be deposited. Other deeds were subsequently deposited, which proved to be worthless. The mortgage of £3000 was paid off by *A.*'s representatives, and the genuine deeds were given up to them by the solicitor without the memorandum of deposit. No notice of *B.*'s security had been given to *A.* *B.* then claimed payment of the £2000 against the estate of *A.*, upon the ground of constructive notice to *A.* through his confidential solicitor:—

Held, that *B.*, by neglecting to give notice to *A.* of the transfer of the mortgage, and by giving up the documents originally deposited with him, had lost any right he might have had against *A.*'s estate.

THIS was a claim by *H. W. Banfather*, jun., for a sum of £2000 against the estate of Lord *Southampton*, under the following circumstances.

H. W. Banfather was married in the year 1868, and from that time till February, 1870, his father made him an allowance of £100 per annum. The father then arranged to give his son a sum of

£2000 in lieu of the £100 per annum, which was to be invested upon mortgage, and he communicated that arrangement to *J. Birt*, who had acted as the solicitor to the family of Mrs. *Banfather*, the wife of Mr. *Banfather*, jun., before her marriage, and for Mr. and Mrs. *Banfather* subsequently. He also requested *Birt* to invest the money on behalf of his son, and on the 22nd of February *J. Birt* wrote to Mr. *Banfather*, sen., stating that he had looked out a freehold £5 per cent. mortgage for the £2000, which security would be made out in the son's name.

On the 28th of February Mr. *Banfather*, sen., sent a cheque for £2000 to *J. Birt*, who on the 2nd of March, 1870, wrote to Mrs. *Banfather* stating that he had received the cheque for £2000 and had placed the amount out in her husband's name on a freehold £5 per cent. mortgage on the *Southampton* estate, carrying interest from that day. In March, 1871, *J. Birt* forwarded the following documents to Mr. *Banfather*, jun.:—

"By an agreement dated the 6th of January, 1871, between Lord *Southampton* and *J. Birt*, in consideration of £3000 advanced to Lord *Southampton* by *Jacob Birt*, Lord *Southampton* has deposited with *Jacob Birt* the counterpart lease of the property specified in the schedule, of which property Lord *Southampton* is seised in fee, subject only to the lease appearing in the schedule, and Lord *Southampton* agrees when required to execute a formal mortgage of such premises for securing the principal sum and interest at £5 per cent. per annum," signed by Lord *Southampton*. The schedule contained the leases of various houses in *Euston Road*, *London*.

Memorandum, dated the 25th of March, 1871: "The sum of £2000, part of the annexed £3000 security from Lord *Southampton*, now belongs to the Rev. *H. W. Banfather*, with interest at the rate of £5 per cent. per annum."—Signed *J. Birt*.

By the affidavit of *Henry William Banfather*, jun., it appeared that after he had received the previous documents from *J. Birt* he asked him for the securities mentioned therein, and he received from *Birt* the leases of some houses in the *Euston Road*. Some time afterwards *Birt* wrote and asked him to return those leases as some of the property was to be sold, and he would send him others in their stead. Subsequently he did send others in their

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stead. In all this matter *Birt* acted as his solicitor, and he never had any communication with Lord *Southampton* himself or with the trustees of his will. *Birt* told him at one time that the £2000 was secured upon ground rents of the *Southampton* estate.

It appeared from the evidence that the property comprised in the leases deposited with Mr. *Banfather* by *Birt* under the memorandum of the 25th of March, 1871, was sold by the trustees on the 16th of May and the 1st of December, 1873, and the £3000 and interest paid off to *Birt;* that the substituted deeds proved valueless as a security, and that no notice was given to Lord *Southampton* or his trustees, until after the commencement of this action, of the memorandum of the 25th of March, 1871.

Bristowe, Q.C., and *Whitehorne*, for the claimant, *H. W. Banfather*, jun.:—

Our contention is, that Lord *Southampton* had constructive notice, through his solicitor *Jacob Birt*, of the advance made by us upon the property mortgaged by him. These transactions were frequently being carried on; Lord *Southampton* required advances to a large amount, and he applied to his confidential solicitor to obtain the money for him. It must have been well known to Lord *Southampton* that such large sums of money could not have been the proper moneys of *Birt*, and that the money was made up by advances from more than one person. It was therefore the duty of Lord *Southampton*, or his trustees, to see that the money lent to him was returned to the real lenders. It was probably convenient that one person, *Jacob Birt*, should stand as the ostensible mortgagee, but that did not exonerate the mortgagor from ascertaining the facts, notice of which must be imputed to him through his solicitor. There is a presumption that a solicitor communicates everything to his client. That notice to a solicitor is actual notice to his client, is laid down in *Espin* v. *Pemberton* (1). The case of *Spaight* v. *Cowne* (2) is in our favour, for there it was held that where moneys which form part of a larger sum are placed by a mortgagor in the hands of his solicitor for the purpose of investment, or are lent by him on the security of a mortgage on which he has affected to act as principal, the client is bound by

(1) 3 De G. & J. 547. (2) 1 H. & M. 359.

notice of all the circumstances which come within the solicitor's knowledge. *Brotherton* v. *Hatt* (1) is also an authority laying down the rule that notice to the agent is notice to the principal, and *Bradley* v. *Riches* (2) strongly supports our argument, where it was held that the presumption that a solicitor has communicated to his client facts which he ought to have made known cannot be rebutted by proof that it is the solicitor's interest to conceal the facts.

Then we say that the fact of there being no notice given by Mr. *Banfather* to Lord *Southampton* of his share in the mortgage does not affect his rights in this case. The case of *Bradley* v. *Riches* is again in our favour, and in *Jones* v. *Gibbons* (3) it was held to be unnecessary to give notice to the mortgagor that the mortgagee had assigned, in order to make the assignment valid and effectual.

[They also cited *Withington* v. *Tate* (4) and *Hewitt* v. *Loosemore* (5).]

J. Pearson, Q.C., and *V. Hawkins*, for the trustees of Lord *Southampton's* estate :—

The authorities as to the client having constructive notice of what his solicitor knows have no reference to this case. Lord *Southampton* deposited the deeds with *J. Birt* as a security for £3000 advanced by *Birt*. Then, three months afterwards, *Birt* handed over the deeds to *Banfather* as a security for £2000. It was impossible for Lord *Southampton* to have notice of that transaction unless he received it from Mr. *Banfather*, whose duty it was to give the notice. The transaction between *Birt* and *Banfather* was not one coming within the rule of constructive notice. If *Banfather* had given notice of his incumbrance to Lord *Southampton*, and had retained the deeds deposited with him, he might have had a claim upon Lord *Southampton*, but, having given no notice, and having given up his security, he has no one but himself to blame. As to the necessity of giving notice there are the cases of *Turton* v. *Benson* (6), *Hopgood* v. *Ernest* (7), and the ob-

(1) 2 Vern. 574.
(2) 9 Ch. D. 189.
(3) 9 Ves. 407, 410.
(4) Law Rep. 4 Ch. 288.
(5) 9 Hare, 449.
(6) 1 P. Wms. 495.
(7) 3 D. J. & S. 116.

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servations in *Williams* on Personal Property (1). But throughout these transactions it was *Birt* who was the person trusted by *Banfather*. *Birt* was the confidential solicitor of Mrs. *Banfather's* family. The money was deposited in his custody for the purpose of being invested. That was done in March, 1870, when this mortgage from Lord *Southampton* was not in existence. It is true that *Birt* told a falsehood in saying that the money was then invested, but how could that affect Lord *Southampton?* When *Banfather* discovered by the memorandum of deposit of deeds that Lord *Southampton's* mortgage took place in January, 1871, he ought to have been doubly careful, for he must then have been aware of the fraudulent statement of *Birt*. But having got from *Birt* in March, 1871, an actual deposit of valid securities, he gives them up to *Birt* upon a mere statement that he should have other deeds of equal value, and then, having given them up, he accepts other securities which turn out to be valueless. This was of course a gross fraud, but what had it to do with Lord *Southampton?* The mortgage was paid off by the trustees after Lord *Southampton's* death, and they received the deeds which had been deposited as security. That was all they required, and there the transaction was completed quite irrespective of any claim which Mr. *Banfather* might have on *Jacob Birt*. There is nothing to prevent a mortgagor from paying off his mortgage from time to time if he pleases without taking back the security, unless he has notice of an assignment: *Fisher* on Mortgages (2).

Bristowe, in reply.

MALINS, V.C.:—

This transaction is a very peculiar one. *Birt* was in 1870 the confidential solicitor of Lord *Southampton*. He was also the confidential solicitor of the present applicant, Mr. *Banfather*. Mr. *Banfather*, it seems, had married in the latter part of the year 1868. His father had made him an allowance of £100 a year. It suited the convenience of the father, and also the views of the son, that in lieu of the allowance of £100 a year being continued by the father, the father should pay £2000, to be invested, no

(1) 10th Ed. p. 457. (2) 2nd Ed. vol. ii. p. 589.

doubt, at 5 per cent. in order to produce £100 a year. Accordingly, by arrangement between Mr. *Banfather*, senior, and Mr. *Banfather*, junior, who is now the applicant, that money was paid on the 28th of February, 1870, by the direction of Mr. *Banfather*, senior, into the hands of Mr. *Birt*. Mr. *Birt* was always ready to take any amount from anybody on real estate at 5 per cent., and had always a mortgage ready for those who wanted it. Accordingly, having received the money on the 28th of February, 1870, he writes a letter to Mrs. *Banfather* on the 2nd of March acknowledging the receipt of the cheque, and stating that the money had been invested on a mortgage that day in Mr. *Banfather's* name. That was a gross falsehood, and a gross fraud, because he did not advance the £2000 on any mortgage whatever. But on the following 6th of January, 1871, that is, ten months after the receipt of the money, he takes a mortgage from Lord *Southampton* for £3000. That is not a legal mortgage, but a deposit of title-deeds, and such a deposit as I, for the present purpose, must decide would have created a valid charge upon the estate of Lord *Southampton*. There was also a memorandum of agreement signed by Lord *Southampton* himself, which states that Lord *Southampton* is seised in fee simple in possession of the property on which the £3000 is to be charged, subject only to the leases mentioned in the schedule, which are long leases at ground rents producing an adequate sum to pay the £3000. That is a mortgage from Lord *Southampton* to *Birt*. Now *Birt*, whether in consequence of any application from Mr. *Banfather* does not appear, or whether from compunctions of conscience, one does not know, but whatever it was, at all events not immediately, but two months afterwards, did send this mortgage instrument, and also the deeds referred to in it, to Mr. *Banfather*, accompanied by this memorandum: "Memorandum. The sum of £2000, part of the annexed £3000 security from Lord *Southampton*, now belongs to the Rev. *H. W. Banfather* with interest at 5 per cent. per annum," dated the 25th of March, 1871, and signed *J. Birt*. That is a very formal document. Therefore Mr. *Banfather's* position was materially improved. Up to the date of this instrument, Mr. *Banfather* had nothing in the world but the personal liability of *Birt;* but he now gets handed over to him the original

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memorandum from Lord *Southampton*, and all the title-deeds. If he had been a man of business instead of a clergyman, that which he had once got he would have kept, and if he had, he would have a very good case for a charge against Lord *Southampton's* property comprised in the memorandum. Then *Birt* writes to him, "Please let me have the deeds which I deposited with you on Lord *Southampton's* estate as security on the property for £2000, and I will substitute others of equal value." I do not say that Mr. *Banfather* did not do what many men under like circumstances would have done; no doubt he considered *Birt*, as most men who had any transactions with him considered him to be, not only an honest but an honourable man, and it never entered his mind that he would be guilty of the abominable fraud which he did perpetrate by getting into his hands the deeds which were of value, and substituting something in their place which might just as well have been a brickbat, for *Birt* takes away the deeds which would create a security, and though he tells him "I will substitute other deeds of equal value," what he did substitute was worthless as a security.

Mr. *Bristowe* says that Mr. *Birt* was the solicitor of Lord *Southampton*, and therefore Lord *Southampton* had notice of this transaction, not actually but inferentially—he had notice because *Birt* had notice. But *Birt* in all this was committing fraud. Is a client to have notice of all the fraudulent devices that his solicitor may have recourse to? Because a solicitor cheats other people, is a client to be answerable for that cheating? I cannot accede to such an argument at all. The money, as Mr. *Pearson* has said, was lent to or deposited in the hands of *Birt*. Mr. *Banfather* did not know that Lord *Southampton's* estate was the one that was to be mortgaged to him. The first notice he had that Lord *Southampton's* estate had anything to do with this was in March, 1871, and then for the first time he became acquainted with the fact that he had got a charge on Lord *Southampton's* estate, not, as *Birt* led him to believe, an original mortgage to him *Banfather*, but a transfer in part of a mortgage for a different sum, which might at once have induced him to believe that *Birt* was acting unfairly and dishonourably, because when he told him a mortgage is this day taken in your name at 5 per cent., and he

afterwards put off on him a share in a subsequent mortgage for £3000, if he had been an astute man of business he would at once have seen that *Birt* was imposing on him, and he would have made further inquiry, and that would have led to the discovery of the deceit. But he is hoodwinked by *Birt*. He relies on him, and goes on believing that these substituted deeds were as valuable as the original deeds, instead of being utterly worthless.

How can I, under these circumstances, attribute blame to Lord *Southampton*, who knew nothing at all about it? Who is to blame? It is perfectly clear that if Mr. *Banfather* had employed an indifferent solicitor, that solicitor would have given notice to Lord *Southampton* that, "by the memorandum dated the 25th of March, 1871, the mortgage which was made to *Birt* on the 6th of January last has been transferred to me or deposited with me as security for £2000." That would have been the duty of an indifferent solicitor; but, unfortunately the solicitor who is engaged in the transaction is not an indifferent solicitor, but he is a solicitor who is defrauding *Banfather*, and who had no intention but to defraud him by the transaction. Whose negligence is it? It is clearly the negligence of Mr. *Banfather*. He is not personally to blame except so far as he has departed from the proper usages of business, and he has trusted a man who was unworthy of being trusted, but who, having defrauded him, has also defrauded Lord *Southampton* by not giving him the notice which the nature of the transaction made it his duty to give.

Under these circumstances I am very clearly of opinion, as I intimated in the course of the argument, that by giving up those deeds which Mr. *Banfather* so negligently did, he has lost his claim upon the property of Lord *Southampton*. The lien which he had was constituted by the deposit of the title-deeds, and that he lost by giving up those title-deeds.

Then, how are Lord *Southampton's* trustees to blame? They sold the property; *Birt*, the solicitor, produced all the title-deeds; he got possession of them, no doubt, by a fraud committed on Mr. *Banfather*. But how are the trustees to know that? There is nothing to lead them to that conclusion.

Having lost his lien on that property, what has he got now? He has got this deed. That resolves itself into the question which

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I put to the learned counsel during the argument. Lord *Southampton* mortgages his property to *Birt*. *Birt* has transferred that mortgage, but of the transfer no notice has been given to the mortgagor, Lord *Southampton;* then Lord *Southampton,* or those claiming under him, his representatives, pay the money to *Birt*. Are they guilty of any negligence? I am bound to say that, as prudent men, they would have acted much better if they had not done so. Every obligor or mortgagor, in my opinion, is guilty of a certain degree of negligence, when he pays off a mortgage or bond debt, in not requiring the instrument creating the debt to be delivered up to him. But is he bound to do so? If there is negligence, where is the negligence? The greater negligence is that of the man who takes an assignment of a *chose in action,* as this is, without giving notice of it to the mortgagor. His duty, in order to protect himself, is to give notice to the mortgagor, and if he omits to do so he exposes himself to the risk of the mortgagor paying the debt to the person orginally entitled to receive it. I put this case, which may happen in the ordinary course of business, during the argument: A man borrows £10,000 on his own estate, and verbally arranges with the mortgagee that whenever he can pay him off £2000 the mortgagee will take that on account; having received no notice that the mortgagee does not still remain the mortgagee, that is, having no notice of an assignment, he writes to the mortgagee and sends him a cheque for £2000. Is that a good payment or not? Why should it not be? I quite agree with what was read from the case of *Jones* v. *Gibbons* (1), that it is not necessary to give notice of the assignment of a mortgage; but although it is not necessary to give notice of the assignment of a mortgage, you expose yourself, by taking a transfer and by not giving notice, to the risk that, after the assignment, the mortgagor may make the mortgage of no avail by paying off the mortgagee. That is a risk to which Mr. *Banfather* was exposed by not giving notice. Therefore I believe what is stated in the note to *Jones* v. *Gibbons* to be correct — that although it is not necessary to give notice, any payment after assignment without notice to the mortgagor is a good payment as against the transferee. Therefore, if

(1) 9 Ves. 410.

a man takes an assignment, and does not give notice, and the whole of the debt is afterwards paid to the obligee or mortgagee, that is a good payment against the transferee, although I adhere to what I have said, that there is a degree of negligence attaching to the mortgagor in not having the mortgage deed produced.

With regard to the case which Mr. *Whitehorne* so much relied upon, namely, *Withington* v. *Tate* (1), that was a case in which there was a mortgage and a transfer, and after the transfer of the mortgage the mortgagee was not paid, but there was a payment to the solicitor of the mortgagee, and it was decided by the Master of the Rolls, and his decision was affirmed by Lord *Hatherley*, that the payment to the solicitor of the mortgagee without his authority was no payment at all, and therefore, there being no payment, the transferee of the mortgage had got a perfectly good title. But I asked Mr. *Whitehorne* what would have been the case if, instead of payment being made to the solicitor, it had been made to the mortgagee himself. My opinion is that if the payment had been made to the mortgagee, that would have been a good payment, and that the transferee, not having given notice, would have no right whatever. The decision of Lord *Hatherley* turned upon the fact of the payment being made to the wrong person.

Therefore, under all the circumstances of this case, and being of opinion—and there is no case inconsistent with it—that Mr. *Banfather* lost his lien on the property by delivering back the title-deeds, I am not called upon to say whether he acquired any title upon the property which the substituted deeds related to, although I am afraid, from what I have heard, that it is utterly hopeless for him to attempt to make out any case. By delivering up the title-deeds he gave up his lien on the property. Having lost his lien on the property, I am of opinion that he exposed himself to the peril of having a payment made to the mortgagee, *Birt*, in his absence, which was caused entirely by his own conduct.

On all these grounds, therefore, I am of opinion that Mr. *Banfather* has lost his claim against the estate of Lord *Southampton*.

Solicitors: *Stoneham & Legge; Farrer, Ouvry, & Co.*

(1) Law Rep 4 Ch. 288.

V.-C. B.
1880
Nov. 4, 13.

JENNER *v.* TURNER.

[1879 J. 163.]

Will—Condition in Restraint of Marriage—Restriction qualified to the Case of Marriage with a Domestic Servant—Condition valid.

Testatrix devised real estate to her father for life, remainder to her brother for life, remainder to his first and other sons in tail, with remainders over. She then bequeathed the proceeds of her residuary personalty in trust for her brother absolutely. But, she declared, if her brother should thereafter, whether he should at the time be in possession as tenant for life or not, marry a domestic servant, or a person who had been a domestic servant, then the devises and bequests in favour of her brother and issue should be null and void, and in lieu thereof she devised her real estate to the use of the Plaintiffs, and declared that the personalty was to be held and enjoyed with a specific part of the realty.

The father survived the testatrix and died. Thereupon the brother became entitled to the realty as tenant for life in possession. Afterwards, the brother married a person who at the time of her marriage was, and had previously been, a domestic servant:—

Held, that the condition was valid, and that the real estate passed to the Plaintiffs.

TRIAL OF ACTION.

Mary Elizabeth Turner, of *Hopton, Mirfield, Yorkshire*, spinster, by her will, dated the 20th of August, 1867, bequeathed certain specific legacies described in a schedule to the will, and some pecuniary legacies, and charged her real estate with the payment of such of her debts, funeral and testamentary expenses and pecuniary legacies as her personal estate should be insufficient to pay. She devised all her real estate to the use of *Benjamin Chadwick* and *Samuel Joseph Chadwick*, their heirs and assigns, during the life of her father. She bequeathed all the residue of her personal estate to *Benjamin Chadwick* and *Samuel Joseph Chadwick* upon trust for sale and conversion, and upon further trust to invest the proceeds in certain specified securities. She then proceeded to declare that the trustees should stand seised of the real estate and possessed of the investments, thereinafter called "the said trust fund," and of the specified chattels and effects, upon trust to pay the rents, dividends, interest, and annual produce to testatrix's father, *Charles Radcliffe Turner*, of *Hopton* aforesaid, gentleman,

and his assigns, for life, and should also allow him during his life to use and enjoy the said chattels and effects. She then proceeded as follows:—

"And after his decease in case my brother *John William Turner*, of *Hopton* aforesaid, solicitor, shall not then have married, or shall have married during my life with my consent in writing, or shall have so married after my death some person not being or ever having been a domestic servant, then and in such case I devise my said real estate, and declare that the said trust fund and the chattels and effects specified in the schedule above written shall be held in manner following respectively, As to my said real estate, To the use of my said brother *John William Turner* and his assigns for his life, without impeachment of waste, And after his decease to the use of the first, second, third, fourth, and all and every other son and sons of the said *J. W. Turner*," successively in tail, with remainders over in strict settlement.

She then continued: "And as to the chattels and effects specified in the schedule above written, I declare that the said" (trustees) "shall hold the same in trust for the then wife, if any, of my said brother and her assigns for her life, and after her decease, in trust to permit the same from time to time to go and be held and enjoyed with my said real estates so far as the rules of law and equity will permit, by my said brother during his life, and after his death by such one or more of the children or other issue of my said brother as for the time being shall be entitled to the possession of the said estates under this my will, yet so that the same chattels and effects shall not vest absolutely in any child or children of my said brother unless and until such child or children shall attain the age of twenty-one years, but without prejudice to enjoyment and use and benefit thereof during minority.

"And as to the said trust fund, and also, if my said brother shall be then unmarried, as to the chattels and effects specified in the schedule above written, I declare that the said" (trustees) "shall hold the same in trust for my said brother *John William Turner* absolutely. But if my said brother shall marry during my life without my consent in writing, or if he shall already have married, or shall hereafter (and whether he shall at

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the time of such marriage be in the enjoyment of my said real estate as such tenant for life as aforesaid or not) marry a domestic servant, or a person who is, or has been, or who shall at any then previous time or times have been a domestic servant, then and in such case I declare that the devises and bequests hereinbefore made in favour of my said brother, his wife, and his sons, daughters, and issue, and every or any of such persons or classes shall be absolutely null and void and of no effect, and in lieu thereof I devise my said real estates respectively to the use of such persons respectively with such limitations and in the same manner in all respects as the same real estates are hereinbefore devised and limited to and upon in case of default or failure of issue of my said brother *John William Turner*.

"And I declare that the said trust fund and the said chattels and effects specified in the said schedule above written shall be held in manner following, that is to say, as to the chattels and effects specified in the schedule above written, I declare that the said" (trustees) "shall hold the same upon trust to permit the same from time to time to go and be held and enjoyed with" (a certain specified portion of the real estate), "so far as the rules of law and equity will permit, by the person or persons who for the time being shall be entitled to the possession of the said estate under this my will, yet so that the said chattels and effects shall not vest absolutely in the child of any person hereby made tenant for life of the said estate unless and until such child shall attain the age of twenty-one years; but without prejudice to enjoyment and use and benefit thereof during minority."

Testatrix died soon after the date of the will, which was proved in February, 1868.

Charles Radcliffe Turner, the father of the testatrix, died on the 10th of September, 1871.

On the 17th of December, 1872, *John William Turner*, the testatrix's brother, married *Mary Annie Sowerby*, spinster.

On the 20th of July, 1879, *John William Turner* died.

On the 13th of November, 1879, the writ in this action was issued. The Plaintiffs, *Henry Jenner* and others, claimed to be the persons, who, if the limitations in the will in favour of *J. W. Turner* and his issue ceased on the marriage of *J. W. Turner* in

1872, thereupon became tenants for life in possession of the several portions of real estate devised by the will respectively; and thus far, the claim was not opposed on behalf of the Defendants, who were *Martha Brook Turner* and *Jemima Robinson Turner*, infant children of *J. W. Turner*, *Mary Annie Turner*, his widow and executrix, and *George Stocks*, her co-executor.

The Plaintiffs alleged that the Defendant *Mary Annie Turner* was for many years before her marriage with *J. W. Turner*, a domestic servant in the employment of *Charles Radcliffe Turner*, that she was in his service as a domestic servant at his death, and that after *Charles R. Turner's* death she continued to be the domestic servant of *J. W. Turner* up to the date of her marriage with him.

They charged that upon the marriage of *J. W. Turner* with the Defendant *Mary Annie Turner*, and under the provisions in the will, all the limitations in favour of *J. W. Turner* and his issue, and all trusts (if any) in favour of his widow, ceased, and that the remainders and trusts over contained in the will expectant on the death of the said *J. W. Turner* and failure of his issue took effect in possession, and that thereupon the Plaintiffs became entitled as above mentioned.

The Plaintiffs further said that since *J. W. Turner's* death the rents and profits had been received by the Defendant *Mary Annie Turner*, and they claimed possession of the several estates devised by the will; a receiver of the rents and profits; an account of the amount received by *J. W. Turner* subsequent to the date of his marriage, and of the amount received by the Defendant *Mary Annie Turner* subsequent to his death; and payment from the estate of the former, and by the latter respectively.

The statement of defence stated that the Defendant *Mary Annie Turner* was recommended by her great-uncle, *D. Tatterson*, a surgeon, to nurse the late wife of *Charles Radcliffe Turner*, who, before her death, asked her husband, *C. A. Turner*, to retain the Defendant as his housekeeper, and accordingly she remained in that capacity during the life of *C. A. Turner*, receiving no wages, but asking for and receiving what money she required for herself and the housekeeping. Save as aforesaid, it was not the fact that she was for many years a domestic servant. After *C. A. Turner's*

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death she continued in the capacity of housekeeper to *J. W. Turner*, and did not otherwise become his servant up to their marriage, or up to any other time.

They also submitted that the condition subsequent in the will was illegal and void as being in undue restraint of marriage, and contrary to public policy.

An answer to interrogatories on behalf of the Plaintiffs was delivered, and issue was joined on the 24th of March, 1880.

Sir *H. Jackson*, Q.C., and *Wolstenholme*, for the Plaintiffs :—

The principle of carrying out the will of a testator, irrespective of any opinion the Court may hold as to the merits of his dispositions, has of late years become more prevalent than formerly. In *Hodgson* v. *Halford* (1) Vice-Chancellor *Hall* decided in favour of the validity of a clause in a power of appointment excluding such children of the appointor as should not profess the Jewish religion.

This is not a disposition of personal estate, as to which the rules which are applicable are mostly derived from the civil law.

"But," says Mr. *Jarman* (2), "even in regard to devises of real estate it seems to be generally admitted (though the point rests rather on principle than decision), that unqualified restrictions on marriage are void, on grounds of public policy. Though, where lands were devised to *A.* in fee, with an executory limitation over if she married with any person born in *Scotland*, or of Scottish parents, the devise over was held to be *valid*, as not falling within this principle": *Perrin* v. *Lyon* (3). Upon this decision we rely.

Whether this forfeiture clause be read as a condition subsequent or as a limitation over, is immaterial. "If in the case of real estate there were a series of authorities shewing that the distinction between a condition and a limitation is material, we should be bound to follow them. But there are no such authorities": *Jones* v. *Jones*, *per Blackburn*, J. (4).

Hemming, Q.C., and *B. B. Rogers*, for the Defendants :—

A condition in defeasance of an estate already vested, as in this

(1) 11 Ch. D. 959.
(2) Jarm. on Wills, 3rd Ed. vol. ii. p. 45.
(3) 9 East, 170.
(4) 1 Q. B. D. 279, 283.

instance, is to be viewed differently from a condition precedent. There are cases where a testator will not be permitted to do by a condition subsequent what he may do by a condition precedent. This is a condition subsequent of the harshest kind.

The objection to conditions in restraint of marriage is not confined to personal estate, though it may take a somewhat different form in the case of real estate. The very case of *Perrin* v. *Lyon* (1), which is relied on, shews at least this, that an unqualified restriction on marriage would be bad as to real estate. Otherwise there would have been no need of the close examination of the particular restriction in that case to see whether it was good or bad.

There is no doubt that rules applying to personalty are derived from the canon law, whilst those applying to realty are mainly derived from the common law of *England*. *Jones* v. *Jones* (2) has been cited. In that case it is not quite clear whether the clause was a limitation or a condition subsequent. What the Judges held was that the intention was to provide for *Mary Daniel* whilst she remained unmarried, and until, as the testator assumed, another provision would be made for her. On the whole case it is clear that the Court did not in that case consider that the doctrine applied only to personalty. *Lloyd* v. *Lloyd* (3) is an authority to shew that the rule as to a mixed fund follows that as to personalty; and *Bellairs* v. *Bellairs* (4) is to the same effect.

What occurs in this case is not a mixed fund, but a gift of personalty in terms identical with those of a prior gift of realty; and we ask the Court to hold that this is an expression of intention which is *in terrorem* only, and cannot be enforced.

The point is not without authority, whatever view the Court may take of the weight of that authority. In a marginal note to a *placitum* in Equity Cases Abridged (5), the learned compiler (6)

(1) 9 East, 170.

(2) 1 Q. B. D. 279, 283.

(3) 2 Sim. (N.S.) 255.

(4) Law Rep. 18 Eq. 510.

(5) Vol. i. p. 110.

(6) The name of the compiler of this collection of cases is not given in the title; he appears only as "A Gentleman of the *Middle Temple*." *Viner* (5 Abr. 408) states that "that great man," Mr. *Pooley*, was the compiler of Precedents in Chancery; and again (21 Abr. 490), after referring to the circumstance that a *placitum* in the 1st vol. of Equity Cases Abridged is in the same terms as a *placitum* in Precedents in Chancery, observes that this makes it more probable that "that fine abridgment" (namely, the 1st vol. of Equity Cases Abridged) "is the

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says: "A devise upon condition not to marry at all, or not to marry a person of such a profession or calling, is void by our law, whether there be a limitation over or not; but if it were upon condition not to marry a Papist, or a certain person by name, it may be good." And with express reference to this *dictum* the Irish Lord Chancellor (*Fitzgibbon*) observes: "Upon this point I take the principle to be settled that the law allows reasonable restraints upon marriage. But that conditions prohibiting marriage, or leading to a probable prohibition of marriage, are condemned upon principles of sound and general policy. A condition in restraint of marriage, excluding men of a particular profession, has been held void" (1); *Keily* v. *Monck* (2), thus clearly recognising the note as a binding authority.

The question is not whether this widow is to take anything or not—the question lies between the children of the brother of the testatrix and the Plaintiffs. It has been often cited as a maxim that conditions in defeasance of estates are odious. But this is against public policy, and on two grounds, one, that it is in restraint of marriage—an objection which has come down to us from times when *England* was more sparsely populated than at present—the other, that it tends to promote caste distinctions, and to prevent one class of society mingling with another. The law as cited from Equity Cases Abridged shews that a testator is not to be at liberty to taboo a particular class of Her Majesty's subjects.

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work of a very ingenious gentleman deceased, who had the custody, if not, the property, of the original cases, and who, as I have been informed, did in his lifetime declare that he was himself the author of such Abridgment. To the same effect, the Solicitor-General in 1796, Sir *John Mitford*, in commenting on a case of *Attorney-General* v. *Thompson* (Pr. Ch. 337), observes: "The same case is in 1 Eq. Ca. Abr. 301, in nearly the same words, which induces one to think, as it is generally supposed, that the author of 1 Eq. Ca. Abridged and of Precedents in Chancery is the same person": *Mitchell* v. *Bower* (3 Ves. 285.) *Viner*, however, in a marginal reference (12 Abr. 24) to the 1st vol. of Eq. Ca. Abr. speaks of it as "*Robins'* Eq. Abr.," which is in conflict with his other statement. Sir *R. P. Arden*, M.R., in *Chaworth* v. *Beach* (4 Ves. 566), speaks of Equity Cases Abridged as a "very good book": see *Bridgman's* Legal Bibliography, p. 111; *Wallace's* Reporters, p. 305. The second volume of Equity Cases Abridged, by another compiler, is not so highly esteemed as the first.

(1) 1 Eq. Ca. Abr. 110.

(2) 3 Ridg. P. C. 205, 261.

There was a time when Jews were aliens, and not Her Majesty's subjects, and when Papists were not in the position of other subjects. When *Perrin* v. *Lyon* (1) was decided *Scotland* was, as now, outside the jurisdiction of English Courts, and we are not now considering whether that decision was a narrow one or not. It is enough to say that it is not the present case.

If the Court should decide against the Defendants, the Plaintiffs can have no more than six years' arrears of rents and profits before the issue of the writ.

[Sir *H. Jackson* :—We do not claim more.]

The Plaintiffs are not entitled to any arrears. They ought to have issued their writ, and brought their complaint earlier.

Sir *H. Jackson*, in reply :—

The reference to *Vernon* (2) in the marginal note to Equity Cases Abridged has nothing to do with the point. Then what becomes of the authority of that *dictum ?*

Hemming, Q.C. :—The reference to *Vernon* is in support of the other branch of the note.

BACON, V.C. :—

The question to be decided in this case appears to be one of law only, and is to be governed by well-settled principles of law, having regard to the construction of the will out of which the question arises. [His Lordship read the passages of the will extracted above, and portions of the pleadings, and having reviewed the evidence, continued :—]

I think it is clearly proved that *M. A. Turner* had been the domestic servant of a certain Mrs. *Weld*, whose wages in that character she received, and that whether she was afterwards called housekeeper or not, or did or did not receive wages from the *Turners*, father and son, or either of them, she had been, and was, a domestic servant at the time when she married *John William Turner*.

This being so, the only remaining question is as to the con-

(1) 9 East, 170. (2) Vol. i. 20.

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struction and effect of the will, and this is pointedly and explicitly raised by the submission in the defence, that the condition subsequent in the will was illegal and void, as being in undue restraint of marriage, and contrary to public policy. In support of this contention reference has been made to the cases (of which no doubt there are many) in which gifts of personal estate accompanied by conditions on restrictions upon the marriage of the donee have been held to be inoperative, and *in terrorem* only. It is, however, needless to advert to such cases or to the principles involved in them, since it is the plain and settled rule of law that they have no application to legal limitations of real estate, which form the subject of the present action. And I may here observe that the suggestion which has been made, that the trust fund disposed of by the will is a mixed fund of realty and personalty, and is therefore to be considered with regard to the well-established distinctions between conditions applicable to personal estate, is not sustainable; since the testatrix charged her real estate with the payment of such of her debts and funeral and testamentary expenses and pecuniary legacies as her personal estate should be insufficient to pay, and her personal estate has been found to be insufficient for those purposes, and the deficiency has been applied by means of a mortgage of the real estate which remains undischarged.

The single question to be determined is, therefore, whether the limitation in favour of the Plaintiffs is valid and took effect upon the marriage of *John William Turner* with *Mary Annie Sowerby*, she being a person who at the time of the marriage "was or had been or should at any previous time or times have been" a domestic servant. And upon this question it appears to me that there is no reasonable ground for doubt. In the first place there is no reason nor any authority for saying that a testator may not make it a condition that the person the object of his bounty shall not marry any particular person by name, or any person of a particular nation, or belonging to any specified class. It is not competent to the Court to seek to inquire into the motives which may have induced the restriction. If it could be properly said they had been prompted by spite or malevolence the condition would nevertheless be valid; for the law does not prohibit testators

from indulging such bad feelings, provided that no principle of public policy is thereby contravened. Under this will no question can arise in which public policy can be said to be involved. The condition is not in restraint of marriage generally, for it was competent for *John William Turner* to choose a wife from the whole female world, except only that portion of it which comprises domestic servants. The point however is covered by a distinct and express and binding authority. In *Perrin* v. *Lyon* (1) the testator devised his real estate to his daughter, subject to the condition that if she should marry a Scotchman, then she should forfeit all benefit under his will, and the estate so given to her should descend to such person or persons as would be entitled to it under his will in the same manner as if his daughter were dead. The daughter, being under age, married a Scotchman who survived her, and she died leaving a son. A case was sent from the Court of Chancery for the opinion of the Court of King's Bench upon the question, "who, under the circumstances, was entitled to the devised real estates?" It was elaborately argued by counsel of great ability, and it was determined by Lord *Ellenborough* and three other Judges that the two children of the testator's nephew (who was named in the will) were entitled to the real estates. There is no detailed judgment of the Court of King's Bench, but there can be no doubt that the decision, applying to the facts of the case as stated, does determine that the condition upon which the estate devised to the daughter in fee was to go over to other persons was perfectly valid, and that, it being broken by the daughter's marriage with a Scotchman, the gift over took immediate effect and annihilated the estate, which, but for the condition, the daughter would have taken; and that, by the breach of that condition, the title of her heir-at-law, and of her husband, as tenant by the curtesy, were excluded, and immediate effect was given to the subsequent limitation.

I am therefore of opinion that the Plaintiffs have established the right they claim, and that they are entitled to a judgment in their favour declaring them entitled to the possession of the several estates of the testatrix devised by her will.

From the date of his marriage in December, 1872, *John William*

(1) 9 East, 170.

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Turner was in wrongful possession of the estates, and from the time of his death in July, 1879, the like wrongful possession has been continued by the Defendant *M. A. Turner;* and the moneys received by them respectively were the moneys of the Plaintiffs. I think, therefore, that the Plaintiffs are entitled to an account of the rents and profits of the estates as against the assets of *John William Turner*, and against the Defendant *M. A. Turner*, from the time of his death, but that such account should be limited to six years before the date of the writ in this action.

If the representatives of *J. W. Turner* do not admit assets of *J. W. Turner*, there must be the usual decree for the administration of his estates.

Under the circumstances of the case, and inasmuch as the principal question in the action relates to the construction of the will of the testatrix, I do not think it right to make any order as to the costs of the action up to the hearing.

Solicitor for Plaintiffs: *H. C. Beauchamp.*
Solicitors for Defendants: *Wilkinson & Son.*

V.-C. B. 1880 Dec. 11.

Ex parte CAMPBELL.

CAMPBELL *v.* CAMPBELL.

[1878 C. 99.]

Administration of Assets—Executor suing on behalf of himself and all other Creditors—Right to retain.

18 Ch D 184

In the administration of a testator's estate, the right of an executor to retain for his debt is not affected by the circumstances that he is himself the Plaintiff, suing on behalf of himself and all other the creditors, and that he has submitted to account in the ordinary form of an administration decree.

FURTHER CONSIDERATION.

An action was commenced by writ of summons, issued on the 28th of March, 1878, on behalf of an executor, suing on behalf of himself and all other the creditors of the testator, against the co-executrix, who was sole Defendant, claiming administration of the real and personal estate. There were no pleadings; and on the 3rd of March, 1878, upon motion for judgment in default of

pleadings, "the Plaintiff, *James Campbell*, by his counsel submitting to account," accounts and inquiries were directed, and it was ordered that the personal estate be applied in payment of the "debts and funeral expenses in a due course of administration" —in the usual form.

The Chief Clerk having made a certificate, it was proposed to preface the order on further consideration by the declaration that the Plaintiff, as executor, had a right to retain in respect of his debt (which had been found to be £1500 for principal, and £139 8*s.* 4*d.* for interest) out of the personal estate.

The Defendant opposed.

Fischer, Q.C., and *Knox*, for the Plaintiff:—

There is a balance which has been found due to the estate from the Plaintiff and Defendant as executors. As against this balance, the Plaintiff's right to retain is expressly established by *Kent* v. *Pickering* (1); and this right is not disputed.

But as to the personal estate in Court, it has been suggested that the executor, by instituting this suit on behalf of himself and all other creditors, has forfeited and lost his right of retainer.

In *Thomson* v. *Grant* (2) the suit was instituted by an executor on behalf of himself and other creditors, and upon the death of the plaintiff, was revived by the plaintiff's executor, who was also a creditor. The plaintiff in the revived suit, having been appointed consignee of certain *West India* plantations, was held entitled to retain out of the balances in his hands as consignee.

In *Player* v. *Foxhall* (3), the right of an heir to retain was held to have been forfeited, but expressly on the ground that he had not claimed the right in due time. This distinction was recognised by Vice-Chancellor *Wickens* in *Ferguson* v. *Gibson* (4).

Payment of money into Court does not extinguish the executor's right: *Richmond* v. *White* (5).

Sir *H. Jackson*, Q.C., and *Owen*, for the Defendant:—

No decision on the express point appears to have been reported.

(1) 2 Keen, 1.
(2) 1 Russ. 540, n.
(3) 1 Russ. 538.
(4) Law Rep. 14 Eq. 379, 385.
(5) 12 Ch. D. 361.

V.-C. B. 1880 *Ex parte* CAMPBELL. CAMPBELL *v.* CAMPBELL.

In *Thomson* v. *Grant* (1) the point discussed was, whether the executor of an executor could retain, and it was held that he could. That is not the question here.

Player v. *Foxhall* (2) more resembles this. There it was held that the heir "having consented to be an accounting party" for the whole proceeds of the estate, not having set up the retainer in due time, and having come in to prove under the decree, had lost his right. Here the Plaintiff has submitted to account, and has come in to prove under the decree. The result is, that he must be held to have lost his right.

Richmond v. *White* (3) was a decision upon another point.

[BACON, V.C., referred to *Duignan* v. *Croome* (C. A. Nov. 19, 1880) (4).]

BACON, V.C.:—

The law which gives to the executor a right to retain is clear; and I cannot find that anything has been said in the cases referred to which tends to shew that the legal right has been defeated by what has taken place here.

As to the case of *Player* v. *Foxhall*, upon what terms the claim of the heir in that instance was carried in, I cannot tell. It was not unusual for a claiming creditor to depose that he had not received any security or satisfaction for his debt. Whether or not that form was adopted in *Player* v. *Foxhall* I do not know, and do not inquire; for what the Court said in *Player* v. *Foxhall* was virtually this: You have answered, and gone in before the Master as an accounting party, and consented to be charged; you have proved for your debt and interest before the Master, and the Master's report has been confirmed. During all this time you have made no claim to retain. You come too late now, if you ask me to allow you to set up this right at this stage of the proceedings. If this case had been at all like that I should have felt bound to follow it, and to come to a like conclusion.

This is a plain, straightforward case. The executor's right is one which, like any other, may be lost, forfeited, or released. But I cannot entertain any doubt that, under an order that the

(1) 1 Russ. 540, n.
(2) Ibid. 538.
(3) 12 Ch. D. 361.
(4) See also *Nunn* v. *Barlow* (1 S. & S. 588).

estate shall be applied in payment of debts in a due course of administration, the executor's right to retain is preserved. His right is a plain legal right, and he has done nothing, either by instituting a creditor's suit or by submitting to account in the ordinary form, which shews an intention to relinquish it.

The Plaintiff's right to retain cannot be gainsaid, and a declaration of his right will form part of the decree.

Solicitors: *Combe & Wainwright.*

V.-C. H.
1880
Nov. 13.

In re ORPEN.
BESWICK *v.* ORPEN.

[1877 O. 48.]

Bequest to Bankrupt Debtor—Composition—Retainer—Assignment by Debtor of Share of Estate.

D., who was indebted to his father, *L.*, on a bill of sale, and a promissory note, was adjudicated bankrupt. At a meeting of the creditors of *D.* a composition of 2*s.* 6*d.* in the pound was accepted in satisfaction of the debts due to them, and the bankruptcy was annulled. *L.*, who did not prove his debt, and was not paid the composition, died, having bequeathed to *D.* a share of his estate. The executors who proved the will (*D.* being an executor, who did not prove) did not prove the debt under the composition. *D.* assigned his share of the estate to *B.*, who brought an action for the administration of *L.'s* estate. The executors claimed a right of retainer against *B.* for the debt:—

Held, that the amount of composition was substituted for the provable debts, whether such debts were proved by the creditors or not; and that the executors were not entitled to the right of retainer against the bequest of the share of the estate for the whole debt, but only for the composition on the debt and interest; six years' arrears of interest on the promissory note, and the whole arrears on the bill of sale.

THIS was an action by an assignee of the share and interest of a legatee under a will, for the administration of *Lawrence Orpen's* (the testator in the action) estate. An administration order was made, and in the proceedings in Chambers the executors claimed a debt due to their testator from the Plaintiff's assignor, which they said exhausted all his interest in the legacy. The Plaintiff accordingly was directed to prove his claim before anything more was done. The Chief Clerk prepared a draft certificate shewing that the Plaintiff was not entitled to any part of the estate, *i.e.*, that the right of retainer of the Defendants, the executors, would exhaust the share or interest of the legatee under the will in respect of his debt due to the estate.

The Plaintiff took out a summons for the opinion of the Judge. When it came on to be heard in Chambers, a direction was given that a statement of facts should be prepared, and that the summons should be adjourned into Court: and it now came on to be heard.

The statement of facts as agreed upon between the parties was as follows:—

The Defendant, *Daniel Orpen*, was indebted to his father, *Lawrence Orpen*, in the sum of £550, *i.e.*, £350 secured by a bill of sale, under seal, given by him to his father in December, 1861, and which contained a covenant to pay that sum; and £200 owing upon a promissory note given by him to his father in December, 1863. *Lawrence Orpen* died in May, 1874. By his will, made in April, 1865, he gave all his estate to the Defendants, three executors, *Daniel Orpen* being one of them, upon trusts for his six children in equal shares, as tenants in common.

D. Orpen, in August, 1868, executed a deed of composition with his creditors under the 192nd section of the *Bankruptcy Act*, 1861, by which he agreed to pay 10*s.* in the pound at the times therein mentioned, and the deed was assented to by the requisite statutory majority, in number, representing three-fourths in value of the creditors scheduled to it whose debts amounted to £10 and upwards, and was registered.

Lawrence Orpen was not scheduled to nor did he sign the deed, and *D. Orpen*, in his affidavit verifying the schedule as a true and full account of all his debts, amounting to £10 and upwards, including debts secured, did not mention any debt as being due to his father, and if he was a creditor of *D. Orpen* as for a provable debt in bankruptcy in respect of the £350 and £200 at the date of the deed of composition, it was not assented to by the requisite majority of creditors representing three-fourths in value.

D. Orpen was, on the 19th of June, 1872, adjudicated a bankrupt, and subsequently a meeting of his creditors was held. The resolutions passed at it by a statutory majority were that a composition of 2*s.* 6*d.* in the pound, which was offered by the bankrupt, should be accepted by the trustee in satisfaction of the debts due to the creditors, upon condition that the adjudication in bankruptcy against the debtor should be annulled. The composition was to be payable within fourteen days after the approval of the Court was obtained to the resolutions. An order of approval was made on the 18th of September, 1872, and the adjudication was at the same time annulled.

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Lawrence Orpen did not prove his debt, and no composition was paid to him by *D. Orpen.*

The testator's will was proved in August, 1874, by two of the executors, but not by *D. Orpen.*

D. Orpen, in December, 1874, executed a deed, charging his interest under the will in favour of the Plaintiff, who gave notice of the charge to the executors immediately afterwards.

D. Orpen was adjudicated a bankrupt a second time in July, 1875.

The questions for the opinion of the Court were whether the proceedings under the deed of composition of 1868, or those in the bankruptcy of 1872, got rid of any claim which the testator might have had against *D. Orpen,* and so discharged him and his share in the estate, which the Plaintiff claimed as assignee, from any liability to make good his debt or some part of it, and if not, whether the share of *D. Orpen* ought not to be debited with interest at the rate of 5 per cent. upon both sums.

The sum due to *D. Orpen* in respect of his share and interest was £649 1*s.* 10*d.*, and if the executors should be entitled to be paid the £550, there would be a balance of only £99 1*s.* 10*d.*, subject to be reduced by interest if any was payable.

W. Pearson, Q.C., and *Method,* for the Plaintiff:—

The debt was extinguished by the bankruptcy, and the executors have therefore no right of retainer in respect of it: *Cherry* v. *Boultbee* (1); *Hodgson* v. *Fox* (2); *Armstrong* v. *Armstrong* (3).

That the testator did not prove in the bankruptcy is quite immaterial: *Elmslie* v. *Corrie* (4); *Heather* v. *Webb* (5).

Hastings, Q.C., and *Romer,* for the Defendants, the executors:—

As the testator never proved his debt, the executors have now the right to retain what is due from the debtor: *Stammers* v. *Elliott* (6); *Bailey* v. *Johnson* (7). The executors' right of retainer does not depend upon whether the testator could have sued the

(1) 4 My. & Cr. 442.
(2) 9 Ch. D. 673.
(3) Law Rep. 12 Eq. 614.
(4) 4 Q. B. D. 295.
(5) 2 C. P. D. 1.
(6) Law Rep. 3 Ch. 195.
(7) Law Rep. 7 Ex. 263.

debtor, as such a right exists where a debt cannot be enforced because of the *Statute of Limitations*.

The debtor could not, under the circumstances of the case, be allowed to claim his share of the estate without offering to pay these two sums, as the debt was not extinguished by the bankruptcy, as it was, though upon terms, annulled. The composition of 2*s*. 6*d*. in the pound was to be paid within fourteen days, and it was not paid to the testator at all. A creditor is not bound to go after his debtor, and require payment of his debt, but it is the debtor's duty to find his creditor and pay him what is due. It is also his duty to see that his debts are scheduled. The debtor did not schedule this debt, and he was now estopped from saying it was provable in bankruptcy. The debtor in claiming the share would not be able to say as against the executors that the composition discharged the debt. These were not debts provable in bankruptcy, therefore the testator was not estopped by the provisions of sect. 28 of the *Bankruptcy Act*, 1869; and, inasmuch as the composition was not paid, the debt was not extinguished, and the debtor coming in to claim his share could only be allowed to have it on his paying what he owed. The cases which have been cited for the Plaintiff have no application to this case.

HALL, V.C.:—

I cannot distinguish this case in principle from the decision in *Cherry* v. *Boultbee* (1), though ingenious arguments have been urged in reference to the position of the testator in regard to the fact of his never having proved his debt. It was said that the bankruptcy having been annulled, things were in the same position as if there had been no bankruptcy. Things were in the same position, generally speaking, as if there had been no bankruptcy, subject, however, to this, that something took place with reference to the creditors and the debts, which, having taken place, must be considered to have been in substitution for the remedies which the creditors would otherwise have had in respect of their debts. The creditors for debts recoverable in other ways had, by arrangement, something substituted for those debts, *i.e.*, a composition of so much in the pound. The creditors being a sufficient number at the meeting at which the resolutions were passed, the position of

(1) 4 My. & Cr. 442.

V.-C. H. 1880 *In re* ORPEN. BESWICK *v.* ORPEN.

the debtor was that he became liable to pay the composition to every creditor who could come in and prove his debt in the bankruptcy. All that having taken place, the creditors' former debts ceased to be debts. No doubt the "annulling" must be subject to the payment. The word "annul" is not a very accurate one. It is a flexible word, sometimes it means to supersede and at others to destroy a bankruptcy, and what was done here was to substitute a right to be paid a composition in place of original debts. It was said that the testator's debt was in a better position, because he in fact never claimed to be paid the composition. But that is not so. His rights were barred by the resolutions which were come to by the other creditors at the meeting, and therefore he could not be in a better position by not coming in than if he had done so. Then it was said that if the testator had attempted to come in, he would have been met with the answer that his debt was barred by the *Statute of Limitations*, but I cannot say that that would have been so. That is an issue which I cannot try. The *Statute of Limitations* might have been met by proof of acknowledgment, or in some other way. For the present purpose I must take it that the debt was a provable one within the operation of the resolutions which were passed under the *Bankruptcy Act*. If it was barred it would be an assumption in the testator's favour to consider that he could have come in and shared in the composition. On these grounds I hold that this debt was within the scope and operation of the resolutions, and was bound by them. It being a debt which the testator by his own default abstained from bringing in, he could not be allowed to say, "I have not been paid, and ought to be." The answer would be, "That would be placing you in a better position for not coming in and receiving that to which you were entitled under the composition resolutions." The remaining question is, whether the amount of composition upon the debt ought now to be paid.

W. Pearson, Q.C.:—The executors are not entitled to the composition, because neither the testator nor themselves have come in and proved. The original debt on the note was barred by the *Statute of Limitations*. The only thing that can be said is that the testator abandoned his claim.

HALL, V.C.:—

I think that the executors are entitled to deduct the composition of 2*s.* 6*d.* in the pound on the whole debt, as that was properly payable and claimable at the death of the testator in May, 1874, and nothing which has taken place since that date has destroyed or interfered with the executors' right to it. The *Statute of Limitations* has, treating it as so payable, nothing to do with the case, as the right of retainer is not barred by that statute. I cannot draw any inference from the omission of the testator to come in and prove that he intended to abandon the claim. The order will be that the executors are entitled to retain, as against *D. Orpen's* share of the estate, 2*s.* 6*d.* in the pound on £550; and on all such interest as might be due thereon on the 19th of June, 1872, not exceeding six years' interest on the £200 promissory note; but the interest on the £350 must be calculated as from the 16th of December, 1861, to the date of bankruptcy.

Solicitors: *Bolton & Co.*; *Joseph Plaskitt.*

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[1880 K. 0285.]

Marriage Settlement—Covenant to settle future Property, except such as should be otherwise settled—Gift of Legacy to Wife for Separate Use.

A marriage settlement, in which the wife's property was vested in trustees for her separate use, without power of anticipation, contained a covenant by the husband and wife that if at any time during the joint lives of them any further portion, fortune, or estate should come to or devolve upon either of them by or under any will, or otherwise, they would effectually settle the same (except such future portion, fortune, or estate as should be otherwise settled previously to the same devolving as aforesaid) upon the trusts of the settlement:—

Held, that a gift of a legacy to the wife for her own sole and separate use, free from the debts, control, and engagements of her husband, was excluded from the operation of the covenant.

ON the marriage of *John Keymer Kane* and *Jane Christy Inman*, an indenture of settlement, dated the 9th of July, 1857, was executed by them, whereby certain moneys and securities belonging

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to *Jane C. Inman* were vested in three trustees to pay the income of the trust funds into her proper hands, to and for her separate use, as the same should become due, but without any power in her to anticipate the same, and so that the same should not be subject to the debts or control of *John K. Kane*, but upon trust, after her death, to pay the income to him until he should marry again; and if he should marry again, if there should be any child or children of his marriage with *Jane C. Inman*, to pay one half of the income to *John K. Kane*, and, subject to the trusts aforesaid, the trust funds were to be for the benefit of the children of the marriage equally.

The indenture contained a provision whereby *Jane C. Inman* and *John K. Kane*, for themselves severally and respectively, and for their respective heirs, executors, and administrators, covenanted with the trustees, their executors, administrators, and assigns, that if the marriage should take effect, and at any time during the joint lives of *J. C. Inman* and *J. K. Kane*, "any further portion, fortune, or estate whatsoever, real or personal, or both, shall come to or devolve upon the said *Jane C. Inman*, or upon the said *John K. Kane*, or either of them through her or in her right by descent, or by or under any will, or by donation or settlement, or by the statute for the distribution of the estates of intestates or otherwise, they the said *Jane C. Inman* and *John K. Kane*, and their respective heirs, executors, or administrators, according to their respective rights and interests, shall and will from time to time, at the expense of the said entrusted estate, effectually settle, assign, and assure or join, and concur in all reasonable acts and deeds effectually to settle, assign, and assure all such future portion, fortune, or estate, save and except such future portion, fortune, or estate as shall be otherwise settled previously to the same devolving as aforesaid, upon and for such and so many of the trusts, intents, and purposes," thereinbefore declared of the moneys and securities thereinbefore settled and the income thereof as should be then subsisting or capable of taking effect.

There were four children living of the marriage.

Dorothy Gooch, who died in 1880, by a codicil to her will made in December, 1876, bequeathed a legacy to *Jane Christy Kane*, the

wife of *John Keymer Kane*, of the sum of £2000 for her sole and separate use, and she declared that any money which she had thereby given to any female should be for her own sole and separate use, free from the debts, control, and engagements of any husband to whom she might be married at the time when the same should be paid, and that her receipt alone, notwithstanding her coverture, should be a sufficient discharge to the trustees for the money in such receipt expressed to be received.

The Plaintiffs, *John K. Kane* and his four children, one of whom had attained his majority, claimed to have a declaration against the Defendants, the wife and the surviving trustee of the settlement, that the legacy of £2000 was comprised in or bound by the provisions of the settlement which had reference to after-acquired property, and was subject to the trusts, powers, and provisions therein mentioned or referred to; and if and so far as it might be necessary to have the trusts of the settlement carried into execution.

Robinson, Q.C., and *Blackmore*, for the Plaintiffs:—

It is submitted that this legacy comes within the covenant, which is that of the lady; and it was to apply to property which should devolve upon the husband and wife during their joint lives, "except such future fortune as shall be otherwise settled." The word "settled" contemplates a succession of estates: for life and in remainder; and this legacy, given to the wife for her separate use, and to be paid to her upon her own receipt, is exactly such a gift as comes within the terms of the covenant so far as she is concerned, as, in point of fact, such a gift is not settled at all.

[They referred to *Milford* v. *Peile* (1), *Coventry* v. *Coventry* (2), *Whitgreave* v. *Whitgreave* (3), and *Campbell* v. *Bainbridge* (4).]

Hastings, Q.C., and *Ingle Joyce*, for the Defendant, the wife:—

The question is whether a sum of money given, limited, or assured in the manner in which this legacy was bequeathed, is settled within the meaning of the exception in the covenant. It is submitted that the language used amounts to a settlement; and

(1) 17 Beav. 602.
(2) 32 Beav. 612.
(3) 33 Beav. 532.
(4) Law Rep. 6 Eq. 269.

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if it does, the legacy was otherwise settled previously to the same devolving upon the wife.

[They referred to *Grigby* v. *Cox* (1), and were stopped by the Court.]

Cottrell, for the Defendant, the trustee.

HALL, V.C.:—

The question is whether this sum so given by the codicil of the testatrix, the object and purpose of which was to give it for the legatee's sole and separate use, and for her own disposal, and to be free from the debts and control of her husband, is covered by the words of the covenant. The clause in the settlement which, it is contended, extends to this legacy, and has the effect of bringing it into settlement, would, if the contention were acceded to, be a complete destruction of the testatrix's intention. But do not the words "except such future portion, fortune, or estate as shall be otherwise settled previously to the same devolving," exclude a sum of money given by a will, which sum a legatee is to take, both as to capital and income, "free from the debts, control, and engagements of any husband"? I am of opinion that this legacy was otherwise settled previously—settled in such a manner that the wife was to have it for her own sole and separate use, free from the control of her husband: and that it is excluded from the operation of the covenant in the settlement; therefore there must be a declaration to that effect.

Solicitor: *Fortune*, agent for *Binsteed & Prior, Portsmouth.*

(1) 1 Ves. Sen. 517.

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[1878 A. 91.]

C. A.
1880
V.-C. H.
July 24.
C. A.
Nov. 4.

Mortgage of Freeholds—Contemporaneous Security of Leaseholds for Mortgage Debt—"Collateral" Security—Incidence of Mortgage Debt.

2/Ch.D.

A mortgagor conveyed freeholds by way of mortgage by an indenture which recited an agreement by the mortgagees to advance him the principal moneys upon having the repayment thereof with interest secured "as hereinafter mentioned and by a collateral security or indenture intended to bear even date with" those presents.

On the same day the mortgagor demised leaseholds by way of mortgage to the same mortgagees to secure the same advance by an indenture which recited the mortgage of the freeholds, and that on the treaty for the advance "it was agreed that the same principal and interest should be further secured by these presents."

Each of the two indentures contained a covenant for the payment of the mortgage debt and interest.

In an action to administer the estate of the mortgagor:—

Held (affirming the decision of *Hall*, V.C.), both on the frame of the deeds themselves, and upon the evidence as to the circumstances attending the advance, that the leasehold security was not "collateral" in the sense of "secondary"; and accordingly that, as between the real and personal representatives of the mortgagor, the mortgage debt was payable rateably out of the freeholds and leaseholds comprised in the two securities, and not primarily out of the freeholds.

Observations upon *Marquis of Bute* v. *Cunynghame* (1) and upon the meaning of the words "collateral security."

FURTHER CONSIDERATION and summons to vary.

This was an action by *Richard Athill*, as the heir-at-law and one of the next of kin of his son *George Athill*, who had died intestate in May, 1878, against the widow of the deceased, who had taken out letters of administration to her husband's personal estate, in order to have the personal estate of the intestate administered, a receiver appointed, and the title-deeds relating to the real estate delivered up to the Plaintiff.

The Defendant, by her statement of defence, alleged that, with the exception of one specific property, all the intestate's real estate

(1) 2 Russ. 275.

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was mortgaged; and by way of counter-claim she stated that certain freehold houses at *Stratford*, in *Essex*, were mortgaged by the intestate to *R. D. Fowler* and others to secure £4900 and interest, and that a collateral security for the moneys so secured was given by the intestate by way of mortgage or charge upon certain leasehold houses belonging to him at *Bethnal Green*, and she charged that as between the said securities the mortgage of the freeholds at *Stratford* was the primary security, and that the moneys thereby secured ought to be raised and satisfied out of such freeholds in exoneration of the leaseholds collaterally charged therewith.

The action came on for trial in July, 1878; and in answer to an inquiry directed at the hearing the Chief Clerk, by his certificate dated in May, 1880, found that the real estate comprised in the mortgage to *Fowler* and others was primarily liable to the payment of the mortgage money thereby secured.

The Plaintiff then took out a summons to vary the certificate in this respect, and this summons and the further consideration of the action now came on together for hearing.

The mortgage of the freeholds was effected by an indenture dated the 10th of November, 1870, and made between the intestate, thereinafter called the mortgagor, of the first part, and *R. D. Fowler*, the Rev. *F. Goddard*, Sir *William Milman*, and *H. S. Milman*, thereinafter called the mortgagees, of the other part; and it contained the following recital and testatum:—"Whereas the said mortgagees have agreed to advance out of moneys belonging to them on a joint account to the said mortgagor the sum of £4900 on the said mortgagees having the repayment of the same with interest secured as hereinafter mentioned, and by a collateral security or indenture intended to bear even date with and to be made between the same parties as these presents whereby it is intended that the said mortgagor shall demise certain leasehold hereditaments in *William Street, Bethnal Green*, and elsewhere in the said county of *Middlesex*, to the said mortgagees, and covenant with them for the payment and other purposes as therein mentioned, Now this indenture witnesseth that in pursuance of the said agreement and in consideration of the sum of £4900," &c. The rest of the mortgage was in

the usual form of a mortgage in fee, and comprised a covenant for the payment of the principal sum of £4900 and interest.

The mortgage of the leaseholds was effected by an indenture also dated the 10th of November, 1870, and made between the same parties as the mortgage of the freeholds, and after referring to the several indentures of lease under which the leaseholds were held, it recited and witnessed as follows:—"And whereas by an indenture of even date herewith and made between the same parties as these presents in consideration of the sum of £4900 by the said mortgagees out of moneys belonging to them on a joint account advanced to the said mortgagor the said mortgagor conveyed and assured the freehold pieces or parcels of land, messuages, and hereditaments in *William Street* and elsewhere in the parish of *Stratford, Essex*, to the said mortgagees, their heirs and assigns, by way of mortgage to secure repayment of the said sum of £4900 and payment also of interest as in the reciting indenture mentioned, and the reciting indenture contained also usual powers and covenants, including a power of sale: And whereas upon the treaty for the said advance it was agreed that the same principal and interest should be further secured by these presents; Now this indenture witnesseth that in consideration of the said sum of £4900 to the said mortgagor advanced by the said mortgagees out of moneys belonging to them on a joint account, and which sum is so secured by indenture of even date herewith as aforesaid." The indenture then continued in the usual form of a mortgage of leaseholds by demise, and comprised a covenant for the payment of the principal sum of £4900 and interest.

The nature of the evidence as to the circumstances under which these two mortgages were executed sufficiently appears from the judgments.

W. Pearson, Q.C., and *E. Ward*, for the Plaintiff:—

The mortgage debt is payable rateably out of the freeholds and leaseholds; for though there were two properties of different tenures and two deeds, the advance was one advance upon the two properties as forming together one security. This is shewn not only by the evidence, but also by the frame of the deeds. Each of them is in itself a complete security, and though in the mort-

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gage of the freeholds the expression "collateral security" is applied to the mortgage of the leaseholds, that is not enough to make the one a "primary" and the other a "secondary" security. The proper meaning of the word "collateral" is not "secondary," but "standing side by side." The nearest case to the present is *Early* v. *Early* (1) before your Lordship, which is directly in our favour.

(1) V.-C. H. Nov. 5, 1878.

EARLY *v.* EARLY.

WILLIAMS *v.* EARLY.

[1874 E. 82.]

Mortgage—Memorandum of Deposit—"Collateral" Security—Incidence of Mortgage Debt.

ADMINISTRATION ACTION.

On the 21st of July, 1864, *Richard Early*, the intestate in this suit, having borrowed £1200 from the trustees of the *Star Insurance Company*, gave to them his promissory note for that amount, payable six months after date with interest at £5 per cent. On the same day he deposited with them the title-deeds of certain lands, and gave them a memorandum of deposit in the following terms :—

"In consideration of your advancing to me £1200 on loan until six months' notice of repayment shall have been given, I herewith deposit with you by way of equitable mortgage the undermentioned title-deeds and documents as collateral security for the due payment of the same with interest at the rate of 5 per cent. per annum, and in default of my paying the above-mentioned loan and interest when due, I hereby engage on request to execute to one or more of your trustees a good and effectual mortgage of the property comprised in such deeds with all usual clauses, including a power of sale, such mortgage to be prepared by your solicitor, but at my expense."

On the same day he executed to them an assignment of certain policies of assurance on his life, by way of mortgage for securing the sum of £1200 therein expressed to have been advanced by them to him. This mortgage recited that *Early* was indebted to the mortgagees to the amount of £1200 for money lent which he was unable to pay, and that he had agreed to assign them the policies by way of security, but it did not recite or refer to either the promissory note or the memorandum of deposit. The proviso for redemption was expressed to take effect "on the day of , now next ensuing, which will be in the year 18 ," with interest for the same in the meantime. These three documents were stated in the pleadings in the order here given, but it did not appear in what order they were actually executed. It appeared, however, that only one sum of £1200 was advanced by the mortgagees on the security of the three documents. *R. Early* died intestate in July, 1874, and this action was brought by his widow and administratrix against his heir-at-law and next of kin. The question was whether the mortgage debt was to be borne rateably by the policy moneys and the lands comprised in the memorandum of deposit according to their respective values, or whether the policy moneys were to be first applied in payment of the debt before the lands were resorted to.

W. Pearson, Q.C., and *Bleby*, for the Plaintiff, referred to *Trestrail* v. *Mason*

[They also referred to *Locke King's Act*, 17 & 18 Vict. c. 113, and *Leonino* v. *Leonino* (1).]

Hastings, Q.C., and *J. Beaumont*, for the Defendant:—

The mortgage of the freeholds recites an agreement for an advance which is to be secured by that indenture, "and by a

(7 Ch. D. 655); *Locke King's Act* (17 & 18 Vict. c. 113).]

Dickinson, Q.C., and *Ingle Joyce*, for the heir-at-law.

W. W. Cooper, for the next of kin.

HALL, V.C.:—

I am of opinion that these securities rank equally as regards the order in which they are to be resorted to. The securities are three in number, first, the promissory note, which I call a security, as it is a negotiable instrument payable to the order of the parties six months after date.

The next (taking the order in which they are stated in the pleadings) is the memorandum of deposit, which is to secure the money "until six months' notice of repayment shall have been given." That notice might (as being a prudent thing to do) have been given either the next day, or very shortly after, in which case the money might, as I rather collect, have become payable before the time at which it would have become payable under the third security.

Now, supposing the money had become payable under the second security, the position of the lenders would have been this—the money would have been repayable under the memorandum of deposit; but if it were only a secondary security, not to be made use of or resorted to until the others had been exhausted and found to be insufficient; if that had been the meaning of the transaction, the lenders would have been in the extraordinary position of not being able to realize the security on the land, and of being obliged to wait until such time as the security upon the policies had become capable of being realized.

Again, consider this: how unreasonable and how unlikely it would be that anybody would take as a secondary or auxiliary security which was not to be resorted to until another security had been realized—a charge upon property immediately available, while the primary or principal security was a policy on a person's life which could only be immediately realized (at a loss) by selling and not waiting until it became payable by the death of the person assured.

Then, again, consider this. There is a provision made in the memorandum of deposit that the mortgagor is to execute an effectual mortgage with all the usual clauses, including a power of sale. If such a mortgage had been called for and executed, would it or would it not have contained a provision that that security should not be resorted to at all until such time as the other securities had been previously realized? Certainly not; that is quite plain. It is clear that the matter was all one transaction. The word "collateral," taken by itself, has, as far as I am acquainted with the dictionaries, no such meaning as was contended in argument; and it is not equivalent to "secondary," or

(1) 10 Ch. D. 460.

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collateral security," and the mortgage of the leaseholds recites the mortgage of the freeholds, and that upon the treaty for the advance thereby secured the £4900 advanced should be "further secured" by a mortgage of the leaseholds. Some meaning must be attributed and due effect given to the terms of these recitals. The language of each contemplates that the mortgage of the freeholds was to be the primary, and that of the leaseholds an auxiliary and secondary security; and this is the more plain from the reciprocal variation in their terms. The word "collateral" is no doubt so far flexible that it may be used to mean "side by side," or concurrent. But that is a derivative meaning. Its primary and appropriate meaning is "at the side of"—importing a thing subsidiary, auxiliary, or indirect. That is shewn by its derivation, its original use in the Roman law, and its use in our own language, as these appear in the dictionaries, including (with respect to its use in legal phraseology) *Tomlin's* Law Dictionary. *Marquis of Bute* v. *Cunynghame* (1) is an express decision founded on this being the proper meaning of "collateral." Upon that ground Lord *Eldon* distinguished that case from *Aldrich* v. *Cooper* (2). If the circumstances of the transaction are to be looked at they certainly support this view as to the meaning of the word. The words "further secured" which occur in the leasehold mortgage have also been the subject of express decision, and have been held to import an auxiliary security: *Stringer* v. *Harper* (3). In both these cases it was held that as between the parties becoming entitled to the two estates, that charged by way of "collateral" or "further" security was not liable to contribute anything in respect of the charge. These decisions govern this case and fully support the finding of the certificate, while neither of the cases cited on behalf of the Plaintiff is applicable. There was no provision in either that as between the securities on which the question arose,

"auxiliary," or "only to be made use of in aid." Under these circumstances I look upon the three securities as being all one transaction, and accordingly the security on the land by means of the deposit, and that upon the policies, must be treated as securities liable between themselves to bear the mortgage debt rateably. There will accordingly be a direction to this effect.

Solicitors for all parties: *Ingle, Cooper, & Holmes.*

(1) 2 Russ. 275.

(2) 8 Ves. 382.

(3) 26 Beav. 33.

one should be a "collateral" or "further" security." The question of contribution or exoneration with respect to charges on them as between two estates or securities arises, although the mortgagee might have resorted to either at his pleasure. That appears from the cases already cited and from *Lipscomb* v. *Lipscomb* (1), *De Rochefort* v. *Dawes* (2), and *Trestrail* v. *Mason* (3).

HALL, V.C. :—

The argument which has been addressed to me on behalf of the Defendants renders it a matter of some difficulty to determine what would be the correct view if we had merely to look at the two deeds, and to consider whether in the simple case of two securities, one of which refers to the other as a "collateral security," any priority exists as to the order in which they ought to be resorted to.

Looking at the words of Lord *Eldon* in *Marquis of Bute* v. *Cunynghame* (4), there cannot, I think, be a doubt that he spoke of the collateral security in that case as being one which had associated with it a primary security. The facts of that case were singular. The property which was the subject-matter of the suit had been sold to the Marquis of *Bute*, and the intention of the parties was that the purchase-money, instead of being paid down, should be secured upon mortgage of an estate in *Bedfordshire*, belonging to the Marquis; and it was for a loan upon the security of that estate, and not upon the property sold in the suit, that the parties, according to their original intention, were treating and negotiating. But Lord *Bute* appears to have said, "I give you this security on my *Bedfordshire* estate, and I will throw in or give you also a collateral security on the property I am buying." What the vendors were looking to in the first instance was substantially a proper security according to the terms of the will under which they were selling, and not the less so because what was being done was under the sanction of the Court. The transaction was in that respect somewhat peculiar. It was singular also in another respect upon which Lord *Eldon* observes, viz., that there was no covenant in the latter part of the deed, or relating to the property

(1) Law Rep. 7 Eq. 501.
(2) Ibid. 12 Eq. 540.
(3) 7 Ch. D. 655.
(4) 2 Russ. 275.

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sold to Lord *Bute*, except that if the money were paid according to the proviso which was introduced into the mortgage of the *Bedfordshire* estate a certain term of years should cease, so that it seemed that the other property was thrown in as something additional, and was not treated as the thing on which the loan was made; and altogether that was the conclusion he came to.

Lord *Eldon* then refers to *Aldrich* v. *Cooper* (1), and says that there the word "collateral" did not occur, and all the covenants related to both estates, and that (2) "the purpose was to make both the freehold and the copyhold subject immediately to the debt, though there were not means of making a legal conveyance of both."

Now as to the case before me, it is to be observed that each security is in itself complete as to the whole loan: we have a complete mortgage in each case, and what is remarkable is, that in each deed there is a covenant for the payment of the debt. The circumstance of the property being comprised in two deeds does not convey to my mind anything in favour of treating the second security as "collateral," in the sense of "secondary," to the first, because it was material, having regard to the different tenure of the two properties, that the titles to them should not be mixed up together; while as regards the covenant for payment in both, it is to be observed that one of the securities might possibly be realized before the other, and then it would be right and proper that, in the deed relating to the property which was not realized, there should be a covenant which might be kept in the hands of the mortgagees. From the two deeds themselves, however, all that I collect is this, in that comprising the freeholds the deed of security on the leasehold is spoken of as being "collateral," while in the leasehold deed itself it is merely stated that in treating for the advance it was agreed that the money should be "further secured," but it is not said that it is a "collateral security," so that when we come to the leasehold security it is not treated in any way as being collateral or secondary. Upon the frame of these two deeds, therefore, taking them together, I should rather come to the conclusion that this is not a case in which the leasehold property was intended to be a collateral security in the sense of secondary. If

(1) 8 Ves. 382. (2) 2 Russ. 299.

the intention had been to use the word "collateral" in that sense, it would have been very easy to have expressed that intention with more distinctness. The leasehold deed is not, however, treated as a collateral or secondary security, and it is in every respect a complete, perfect, independent, primary security, and it is called a "further" security, which, so far as it goes, seems to me rather to negative its being secondary. I thus look to the deeds in this case as interpreting the sense in which the word "collateral" is used. The case, however, was not argued simply with reference to the construction of the deeds themselves, but also with reference to the circumstances attending the loan, for both sides considered that the intent might be collected not merely from what is in the deeds themselves, but from what took place on the transaction of the loan. The one side contended that upon the evidence the leaseholds were intended to be a secondary security, the other side that the securities were joint and primary. In my view of the correspondence and the circumstances attending the loan, I consider that the loan was made upon both properties, as being, for the purpose of security, one property; and that the one was not intended as a secondary security to the other.

I must observe that where it is intended that one of two securities to be taken shall be in aid of the other, and that there shall be a distinction between the liability of the two properties as between the real and personal representatives of the mortgagor, or the persons otherwise acquiring title, it is quite a familiar thing in the practice of conveyancing, in framing the instruments or instruments of security, either in the same instrument or in some other instrument, to declare expressly that as between and so far as regards, not the persons secured, but the representatives of the mortgagor or subsequent owners, the one security shall be deemed primary and the other secondary. And when I find nothing whatever of that kind attempted here, I think the conclusion must be that it cannot have been intended that the matter should be left to mere implication, or to be picked out or guessed at from the nature of the transaction. I cannot, in such a state of things as this, hold that it was intended that there should be a difference between these two properties as between the parties entitled to

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the respective equities of redemption in them. I therefore think that the Chief Clerk's certificate must be varied.

From this decision the Defendant appealed. The appeal came on to be heard on the 4th of November, 1880.

Hastings, Q.C., and *Beaumont*, for the Appellants, urged the same arguments as in the Court below, and cited the same authorities.

W. Pearson, Q.C., and *E. Ward*, for the Respondent, were not heard.

JESSEL, M.R. :—

This is an appeal from a decision of Vice-Chancellor *Hall* deciding that a mortgage debt is to be paid rateably out of two properties, one freehold, and the other leasehold, belonging to an intestate. Now, of course, unless there is something to shew that the mortgage debt is to be paid primarily out of one of the two properties, the conclusion follows that they are to contribute rateably; and the real question we have to decide is whether there is anything in the deeds themselves, or in the nature of the transaction coupled with the contents of the deeds, to shew that the mortgage debt was intended to be thrown on one of the two properties to the exoneration of the other. Now, in saying "intended to be thrown," I mean not actual intention, but the intendment or result as a legal consequence of what the parties did. There is no equity between real and personal representatives, and therefore if there really was a completed contract sufficiently evidenced between mortgagor and mortgagee that one of the two properties was to be a primary security, and the other a secondary or ancillary security, not to be resorted to until the primary security was exhausted, the legal consequence would follow that the first property, that is, the property the subject of the primary security, would have to bear the whole burden of the mortgage, if it was sufficient, before the other was resorted to, and that as between the real and personal representatives.

The whole argument really turns upon a very few words contained in the deeds creating the mortgage. The history of the

transaction is very simple. The mortgagor, having freehold and leasehold property, wanted to borrow a sum of money by way of mortgage on the security of both properties. The proposed mortgagees happened to be trustees with power of lending on mortgage of real securities, which power they and their advisers considered was not sufficient to entitle them to lend on leasehold securities. It was suggested—though how such a suggestion came to be adopted by lawyers it is not very easy to understand—that if the money was purported to be lent on the freehold security, and the leaseholds were taken as an additional or further security, there could be no objection even if the freehold security turned out to be insufficient; and it was in consequence of this suggestion being adopted by the legal advisers of the mortgagees that the eventual arrangement carried out by the deeds was that the freeholds and leaseholds were separately mortgaged for the same sum. So much for the history of the transaction.

When we come to the terms of the deeds themselves we find this. There are two deeds of even date. The first is a deed between the mortgagor of the one part and the mortgagees of the other part, which recites that "the mortgagees have agreed to advance out of moneys belonging to them on the joint account to the mortgagor the sum of £4900 on the mortgagees having the repayment of the same with interest secured as hereinafter mentioned, and by a collateral security or indenture intended to bear even date with and made between the same parties as these presents whereby it is intended that the said mortgagor shall demise certain leasehold hereditaments in *Middleton Street, East Bethnal Green,* and elsewhere in the said county of *Middlesex,* to the said mortgagees, and covenant with them for payment and other purposes as hereinafter mentioned." Then there is a common mortgage of the freeholds for £4900 and the ordinary covenant for payment, with power of sale and covenants for title. Then we have the mortgage of even date between the same parties, which recites the leases under which the leasehold property was held and then recites the mortgage of the freeholds in these terms: "whereas by an indenture of even date herewith and made between the same parties as these presents, the said mortgagor, in consideration of the sum of £4900 by the said mortgagees out of

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moneys belonging to them on a joint account advanced to the said mortgagor, conveyed and assured the freeholds pieces or parcels of land, messuages, and hereditaments in *William Street, Martin Street,* and elsewhere in the parish of *Stratford, Essex,* to the said mortgagees, their heirs and assigns, by way of mortgage to secure the repayment of the said sum of £4900 and payment also of interest as in the reciting indenture mentioned, and the other reciting indenture contained all usual powers and covenants, including a power of sale; and whereas upon the treaty for the said advance it was agreed that the said principal and interest should be further secured by these presents." Then there is a common mortgage of the leaseholds for £4900, followed by the usual clauses —a power of sale, covenants for title, and so on. I think there is nothing more to be mentioned.

Now it is alleged on the part of the Appellants that the use of the word "collateral" in the first deed coupled with its use by indorsement—it appears to have been indorsed on the second deed—without anything further to shew an intention to make one property the primary security as contrasted with the other, is sufficient to make the freeholds the primary security for the £4900 to the exoneration of the leaseholds. Of course the mortgagees might have contracted with the mortgagor that it should be a primary security, and that they could only resort to that in the first instance, but they have not done so. They had a clear right under the second deed, if they thought fit, to sell the leaseholds before selling the freeholds, and to apply the money to the payment of the mortgage debt. There was nothing in the two securities which was in the nature of primary and secondary at all. When you look at their terms there was no obligation whatever upon the mortgagees to resort to the one security in priority to the other. There was no contract to that effect. Then why should we attribute to this word "collateral," which does not by itself necessarily mean "secondary," that meaning, when it is not so expressed in the contract itself? Where the word, as is admitted by the counsel for the Appellants, is at all events susceptible of the strict meaning of "parallel" or "additional," why should it have one meaning rather than the other if the nature of the transaction does not require us to depart from its literal meaning? It

appears to me there is nothing whatever in these securities to compel us to say that the word "collateral" means in this case "secondary," or that it was intended as a matter of bargain between the mortgagees and the mortgagor that the mortgagees should first resort to the freeholds for repayment of the mortgage money before they could touch the leaseholds. That being so, it appears to me that the conclusion at which the learned Vice-Chancellor arrived was undoubtedly correct, there being nothing to make the one security available in priority to the other, and that they should both contribute rateably. It only remains to say a word or two upon the authorities. In the first place, there is no doubt upon the authorities that it is a question of construction, of course having regard to the nature of the transaction, and the position of the parties and their dealings with the properties; but here, in fact, we are asked to infer in the absence of express provision that the mortgagor intended as a consequence of his acts that one estate should be resorted to before the other. I agree with the Vice-Chancellor that the practice of conveyancers, although it does not decide the point, is not wholly irrelevant. The practice of conveyancers undoubtedly is, as he has stated it, that where it is intended to throw the mortgage on one of the two properties, or to regulate the incidence of the mortgage debt as between real and personal representatives, to insert a proviso to that effect; and the absence of such a proviso in clearly drawn deeds is, I think, a not wholly immaterial circumstance, though not in itself a sufficient circumstance to decide the question, because undoubtedly where it is not expressed you can infer the intention from the circumstances to which I have already referred.

I do not intend to go through the cases which have been cited. I have done so to a very considerable extent in a reported decision of my own, *Leonino* v. *Leonino* (1); but I will say this, that they are no further a guide to another tribunal in deciding a case upon this subject than any cases of construction are a guide to a Court of construction on another instrument, that is to say, they help the Court in considering what the true meaning of words and phrases may be, but lay down no absolute rule which prevents the Court of construction arriving at its own conclusion from the

(1) 10 Ch. D. 460.

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words used, irrespective of the actual authority of the decided cases not being decisions upon the same instrument or on the same words. Therefore it is only necessary to say that there is no case which has been cited to us which really contains expressions like those used in the case before us, or which turned upon circumstances either identical or even nearly identical with the circumstances of the case we have to decide. I think this appeal should be dismissed.

JAMES, L.J.:—

I am entirely of the same opinion.

COTTON, L.J.:—

I am of the same opinion. As a general rule if two estates subject to one mortgage afterwards come by devolution from the mortgagor to different persons, they must rateably bear the mortgage, unless there is something to shew an intention on the part of the mortgagor that that shall not be the case. That being so, what is relied upon in the present instance? It is said that the deeds themselves shew that the rule is to be departed from, and that the freehold estate is to be the primary security. It was argued that the transaction was really a mortgage of the freeholds to the trustees for the £4900, the leasehold being taken as an indemnity to them in case the freeholds should be insufficient; and, if that had been the real construction of these deeds, then the occasion for which the leasehold security was intended to provide would never have arisen till the freehold estate had been exhausted. In other words, the leaseholds were to provide for the deficiency of the freeholds if there was a deficiency, but until that estate was exhausted there was nothing secured on the leaseholds. But that is not the construction of the deeds. By both deeds the £4900 is secured to the trustees as a debt, and the leasehold security is not to indemnify them in any way except so far as it is a security together with the freeholds for the trust money which they advanced. Then it is said that the expression in the deed "collateral security" is sufficient to vary the rule and to throw, as between the persons claiming the freehold estate and the leasehold estate, the debt upon the freehold estate. It was

conceded in argument that the word "collateral" as between the mortgagee and mortgagor had no effect; and that it could not be contended that, because the freehold mortgage recited that the leaseholds were to be a collateral security, the mortgagees were to have recourse to that property only when the freehold had been exhausted. If that is so, if as between mortgagor and mortgagee the statement in the freehold mortgage that the leaseholds were to be a collateral security did not vary the rights of the mortgagor and mortgagee, I find some difficulty in finding from the use of that word a declaration by the mortgagor of an intention on his part to vary the rights of the persons who through him might become entitled to the different properties. In my opinion there is no such declaration implied by the use of the word. It is simply that the leaseholds were to be an additional or further security, not that one was to be secondary and the other the primary security. In my opinion, therefore, the contention of the Appellant fails. I must say one word about the authorities. The *Marquis of Bute* v. *Cunynghame* (1) was much relied upon by the Appellants. No doubt the use of the word "collateral" in that case in a series of instruments relating to the property was held by Lord *Eldon* to mean that the result of the whole transaction was that one property was not to be called upon to provide for payment of part of the debt; but when it was said there in argument that "collateral" did not mean "secondary," so as to make the other the primary security, Lord *Eldon* did not lay down any rule saying that that was the meaning of the word. He expressly refused to do so, and went upon the whole of the subsequent transactions as well as the transactions relating to the creation of the particular security in determining, as he did, that the freehold estate in that case was to bear the whole of the mortgage, and that no part of it was to be thrown upon the collieries. So that that case, as it seems to me, cannot be referred to as any authority for the purpose of shewing that "collateral" security means "secondary" as regards another security for the same debt. The cases of *Lipscomb* v. *Lipscomb* (2) and *De Rochefort* v. *Dawes* (3) do not establish the proposition

(1) 2 Russ. 275.
(2) Law Rep. 7 Eq. 501.
(3) Law Rep. 12 Eq. 540.

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that when there is a further security at a subsequent time, without anything more, it is to be considered as secondary as between the different persons claiming the two properties from the mortgagor. In each of those cases the Judges came to the conclusion, as matter of construction, that, as regards the original debt—for there was an additional debt in both cases—the estate originally mortgaged was primarily charged. In neither of the cases was it laid down as a general proposition that, when a security is given and there is at a subsequent period a further security, as between the parties claiming the two estates, one is considered as the primary and the other the secondary security. In my opinion, therefore, the decision of the Vice-Chancellor is correct, and the appeal must be dismissed.

Solicitors: *Angell, Imbert-Terry, & Page; A. Crossfield.*

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Mortgage—Attornment Clause—Distress levied after Bankruptcy of Mortgagor—Fixtures—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 34—*Public-house—Goodwill.*

14 Ch D 360 21 CLD 447 452-6, 22 CLD 479 11 QBD 623

An attornment by a mortgagor to a second mortgagee is valid, notwithstanding the fact that the mortgagor has already attorned tenant to the first mortgagee of the same property. And if the amount of the rents fixed by the two attornment clauses is a fair rent of the property, so that there is no fraud on the bankrupt law, valid distresses can be levied by both mortgagees after the commencement of the bankruptcy of the mortgagor.

Morton v. *Woods* (1) explained and followed.

A mortgage (by way of underlease) executed in 1877 of a leasehold public-house contained no express assignment of the fixtures. There was a clause by which, "for the purpose of better securing the punctual payment of the interest" on the mortgage debt, the mortgagor attorned tenant to the mortgagee of the mortgaged property at a yearly rent equal to the amount of a year's interest. And there was a proviso that the mortgagee might, at any time after the day when the first instalment of rent should become due, enter upon the property and determine the tenancy, without giving the mortgagor any notice to quit. Two years afterwards the mortgagor became bankrupt. The mortgagee had taken no step to determine the tenancy:—

Held, that, as the tenancy was created only for the purpose of giving an

(1) Law Rep. 3 Q. B. 658; Ibid. 4 Q. B. 293.

additional security for the payment of the interest, the mortgagee did not cease to be a mortgagee because he was made a landlord, and that he was entitled as against the trustee in the bankruptcy of the mortgagor to trade fixtures which had been annexed to the public-house after the execution of the mortgage.

The goodwill of a public-house is not a personal goodwill, but on a sale of the house passes with it.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

Joseph Kitchin was a hotel keeper, carrying on business at the *Pelican Hotel, Southwark*. He held the *Pelican Hotel* under a lease for a term of eighty years from the 25th of March, 1873. On the 10th of April, 1877, he executed a mortgage of the hotel, together with some other property, to *J. T. Punnett* and *J. J. Stokes*, to secure the payment of a sum of £7965, advanced by them to him, with interest thereon. The mortgage of the hotel was made by way of underlease for the term of eighty years except the last three days thereof. The deed contained no assignment of the fixtures in the hotel. There was a power of sale given to the mortgagees. The deed also contained the following attornment clause: "And, for the purpose of better securing the punctual payment of the interest of the said principal sum, he, the mortgagor, doth hereby attorn tenant to the mortgagees of the hereditaments and premises hereby demised at the clear yearly rent of £399, to be paid quarterly, on the 18th of April, the 18th of July, the 18th of October, and the 18th of January, the first quarterly payment to become due and to be made on the 18th of April, 1877. Provided always that the mortgagees or the survivor of them, or the executors or administrators of such survivor, their or his assigns, may at any time after the 18th of April, 1877, enter into and upon the said hereditaments and premises, or any part thereof, and determine the tenancy hereby created without giving to the mortgagor any notice to quit." The rent fixed by the attornment clause was about equal to the amount of one year's interest as reserved by the deed on the mortgage debt.

On the 4th of February, 1878, *Kitchin* executed another mortgage of the hotel (by way of underlease for the residue of the term of eighty years except the last five days thereof) to *R. S. Hawks*,

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to secure the sum of £4500 with interest. The deed contained a recital of the mortgage of the 10th of April, 1877, and it was expressly made subject to that mortgage and the sum of £7965 and interest thereby secured. The deed contained the following attornment clause: "And for the purpose of better securing the punctual payment of the interest of the said principal sum he, the mortgagor, doth hereby attorn tenant to the mortgagee of the hereditaments and premises hereby demised at the clear yearly rent of £225, to be paid half-yearly, on the 4th August and the 4th February, the first half-yearly payment to become due and to be paid on the 4th August, 1878." And there was a power for the mortgagee at any time after the 4th of August, 1878, to enter upon the property and determine the tenancy thereby created, without giving to the mortgagor any notice to quit.

The rent reserved was equal to a year's interest on the mortgage debt.

On the 3rd of July, 1879, *Kitchin* filed a liquidation petition. On the 25th of August, 1879, the first mortgagees distrained on the goods of the debtor in the hotel for £99 11*s.* 4*d.*, in respect of a quarter's rent due to them under their attornment clause on the 18th of July. On the 11th of September, 1879, the second mortgagee distrained on the goods of the debtor in the hotel for £112 10*s.*, in respect of a half-year's rent due to him under his attornment clause on the 4th of August, 1879. On the 29th of September, 1879, an agreement was entered into between the trustee in the liquidation, the committee of inspection, and the first and second mortgagees, by which it was provided that the first mortgagees should forthwith put up the hotel for sale as a going concern; that they should as the trustee's agents be at liberty to sell to the purchaser of the hotel the furniture and chattels, stock-in-trade and effects therein, and should apply the purchase-money, first in payment of the expenses of the sale of the chattels, next in satisfaction of the amount of their own distress and the expenses thereof, next in payment of the amount of the second mortgagee's distress and the expenses thereof, and should pay the balance to the trustee. But it was provided that nothing in the agreement contained should be deemed an admission by

the trustee of the right of either of the mortgagees to be paid their several distresses, if the trustee should be advised to dispute such right. In pursuance of this agreement the first mortgagees put up the hotel for sale as a going concern, and it realized the sum of £3340. The trade fixtures were also sold by valuation for £526, and the furniture and loose chattels for £734 8*s*. The trustee afterwards claimed the whole amount realized by the fixtures, and he also refused to allow any deduction from the sum realized by the furniture and chattels in respect of the second mortgagee's distress and the expenses of it. The trustee also alleged that he was entitled to the goodwill of the business, inasmuch as it was not expressly comprised in the first mortgage, and there was no stipulation on the sale that the debtor should not carry on the same business elsewhere. And the trustee claimed to have the value of the goodwill allowed to him out of the purchase-money of the hotel. In order to settle these questions an application was made by the trustee to the Court. There was evidence that the net annual value of the mortgaged property considerably exceeded the sum of the two rents reserved by the two attornment clauses.

The Registrar decided that the trustee was entitled to the value of the goodwill of the hotel, and ordered an account to be taken of that value. And he declared that the trustee was entitled to the value of the trade fixtures in the hotel, and ordered the £526 to be paid to him accordingly. And he further declared that the trustee was entitled to the £734 8*s*. realized by the furniture, stock-in-trade, and other chattels, after deducting therefrom the amount of the distress levied by the first mortgagees and the expenses thereof, and certain other costs and expenses. And it was further declared that the second mortgagee was not entitled to distrain for any rent payable by virtue of his mortgage of the hotel, and that he was not entitled to retain the amount of his distress or the expenses thereof.

From this decision the first and second mortgagees gave a joint notice of appeal.

On the hearing of the appeal it was admitted on behalf of the trustee that he could not sustain his claim to such of the fixtures as had been annexed to the public-house before the date of the

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first mortgage, but that his claim must be limited to such of the trade fixtures as had been annexed since the date of that mortgage.

Winslow, Q.C., and *W. B. Heath*, for the Appellants:—

We will leave the question of the fixtures to be raised by the Respondent.

As to the goodwill, in the case of a public-house it goes with the house; it is not a personal goodwill: *King* v. *Midland Railway Company* (1); *Chissum* v. *Dewes* (2); *Ginesi* v. *Cooper & Company* (3).

The main question is as to the validity of the second attornment. Why should there not be a second attornment? There is nothing unlawful in it.

[JESSEL, M.R.:—Is not the meaning this, that the mortgagor will become tenant to the second mortgagee, if the first mortgage is paid off? There is no estoppel; it is nothing more than a personal covenant by the mortgagor that he will pay the rent.

LUSH, L.J.:—How can there be two tenancies of the same property to different landlords running on at the same time?]

There may be. Suppose the lessee of a house sells the lease and then becomes tenant of it to the purchaser; he would be tenant to two landlords at once.

[JAMES, L.J.:—How is it possible at law?]

The tenancy under an attornment operates by a kind of estoppel No doubt it is a fiction, but such a fiction has been held good in many cases, and there is no more fiction in the second attornment than in the first. A man will be bound by a contract with another to become tenant of his own land; *Bacon's* Abridgment (4). That the tenancy operates by estoppel is shewn by *Jolly* v. *Arbuthnot* (5) and *Morton* v. *Woods* (6).

[JESSEL, M.R.:—How can there be any estoppel when the first mortgage is recited in the second?]

(1) 17 W. R. 113.
(2) 5 Russ. 29.
(3) 14 Ch. D. 596.
(4) 7th Ed. vol. iv. p. 850.
(5) 4 De G. & J. 224.
(6) Law Rep. 3 Q. B. 658; Ibid. 4 Q. B. 293.

In *Morton* v. *Woods* (1) there was a first mortgage without an attornment, and afterwards the mortgagor mortgaged the equity of redemption and attorned tenant to the second mortgagee, and it was held that a distress levied by the second mortgagee after the bankruptcy of the mortgagor was valid against the assignee in the bankruptcy, on the ground that, though the second mortgagee had no legal reversion, the tenancy took effect by way of estoppel. The principle of that decision governs the present case. And *Jolly* v. *Arbuthnot* (2) is to the same effect.

[JESSEL, M.R.:—There may be a personal estoppel, though there is no estoppel at law.]

The principle of the decision of *Morton* v. *Woods* governs the present case.

[JESSEL, M.R.:—There were not two tenancies in that case.

JAMES, L.J.:—I can conceive the case of a man being in possession of property as tenant to a person who claims to be a devisee, and a claim being made to the reversion by the testator's heir-at-law. The tenant might attorn to the heir, and then both heir and devisee might distrain for rent. Would that be contrary to law?]

Not at all. It is in evidence that the two rents are together less than the fair letting value of the property. It can make no difference that the rent is payable to two mortgagees instead of to one. When once it is shewn that the rent is a fair one, there is no fraud on the bankruptcy law, and sect. 34 of the Act authorizes the distress: *Ex parte Williams* (3); *In re Stockton Iron Furnace Company* (4); *Ex parte Jackson* (5).

A. Wills, Q.C, and *Arthur Powell*, for the trustee:—

No doubt the only distinction between the present case and *Morton* v. *Woods* is that in that case there was only one attornment clause.

[JESSEL, M.R.:—I was not previously aware of the decision in *Morton* v. *Woods*.

(1) Law Rep. 3 Q. B. 658; Ibid. 4 Q. B. 293.
(2) 4 De G. & J. 224.
(3) 7 Ch. D. 138.
(4) 10 Ch. D. 335.
(5) 14 Ch. D. 725.

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JAMES, L.J.:—I am startled by it.]

The question was whether the mortgagee had the same rights as if an actual tenancy had been created.

[LUSH, L.J.:—In *Morton* v. *Woods* (1) the estoppel was not by deed, for the deed had not been executed by the mortgagees; it was an estoppel *in pais*.]

The difficulty in our way, no doubt, is that *Morton* v. *Woods* is a decision that the Court will give effect to a fiction as against the rights of creditors, and it may be said that, if effect will be given to one fiction, effect should equally be given to another. But in *Morton* v. *Woods* the fiction was a possible one; in the present case, as regards the second mortgagee, the fiction is not a possible one.

[LUSH, L.J.:—By giving effect to the fiction the manifest intention of the parties was carried out.

JESSEL, M.R.:—Suppose the mortgagor had attorned tenant to the second mortgagee only, and afterwards the first mortgagees had come and said, Unless you attorn to us also we will turn you out of possession. If he had done so, there would have been two landlords.]

We cannot point out any other distinction.

As to the fixtures, the tenancy under the attornment was not put an end to by the bankruptcy. The trustee remains tenant, and he has the ordinary right of a tenant to remove trade fixtures annexed to the property during the tenancy.

[JAMES, L.J.:—You say that the fiction of a tenancy must be carried out to its full extent?]

As to emblements, the point is decided by *Ex parte Temple* (2). The mortgagees take the benefit of the tenancy, and they must take the burden also: *In re Stockton Iron Furnace Company* (3).

[LUSH, L.J.:—A tenant forfeits his right to remove fixtures if he commits a breach of covenant, which gives the landlord a right to re-enter.

(1) Law Rep. 3 Q. B. 658; Ibid. 4 Q. B. 293.
(2) 1 Gly. & J. 216.
(3) 10 Ch. D. 357.

JAMES, L.J.:—I think the mortgagor was a yearly tenant.]

In *Co. Litt.* (1) it is said: "If the lord grant the service of his tenant to one man, and after, by his deed bearing a later date, he grant the same services to another, and the tenant attorn to the second grantee, now the said grantee hath the services, and albeit afterwards the tenant will attorn to the first grantee, this is clearly void."

JESSEL, M.R.:—

The question of goodwill has really not been argued. It is quite plain that the goodwill of a public-house passes with the public-house. In such a case the goodwill is the mere habit of the customers resorting to the house. It is not what is called a personal goodwill. Therefore as to that there is really no more to be said.

The other two points certainly are very singular. The first is this. The first mortgagee of a leasehold public-house took an attornment as tenant from the mortgagor to secure the interest on his mortgage; the second mortgagee did the same, and it appeared on the face of the second mortgage that the first mortgage was still outstanding and undischarged. The question we have to decide is whether, under these circumstances, the second mortgagee had a right to distrain after the bankruptcy of the mortgagor for rent accrued under his attornment before the bankruptcy, of course not exceeding a year's rent, which is the limit fixed by the 34th section of the *Bankruptcy Act*. We think he had. It appears to me that the case is really decided by *Morton* v. *Woods* (2), which is the decision of five Judges of the Exchequer Chamber, affirming a unanimous judgment of the Court of Queen's Bench. Even if I differed from the *ratio decidendi*, which I do not for a moment say that I do, I should hold that I was bound by that decision.

Then it comes to this: Is there any fair and intelligible distinction to be drawn between the two cases? Now, I assent to an observation which has fallen very often from Lord Justice *James*, that we must not fritter away decided cases by drawing fine dis-

(1) 19th Ed. [1832], 310 a. (2) Law Rep. 3 Q. B. 658; Ibid. 4 Q. B. 293.

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tinctions. There is really no substantial distinction between the two cases. If the second mortgage created the relation of landlord and tenant, which it did by the operation of a legal fiction (I am not at all finding fault with legal fictions, they are necessary for the purposes of justice, they are merely a mode of putting in legal form the contracts of the parties); if that is so, does it make any difference that there was a prior attornment to a prior mortgagee? I do not see how it can. If by a contract, notwithstanding the fact is known that the legal estate is outstanding in a mortgagee, and that the mortgagor is not really the owner of the reversion, you can create a tenancy between the second mortgagee and the mortgagor by what may be called estoppel or *quasi* estoppel (it does not matter what term we use), it appears to me that there is nothing either in law or in good sense to prevent the same arrangement being made with more than one mortgagee. Otherwise this would happen: if a mortgage were made to two mortgagees by the same deed, and the mortgagor were to attorn tenant to the two mortgagees, there being a proviso between themselves that the one should be first and the other second, that would be good; but if the one mortgage were made by a deed dated the day after the other, it would be bad. It appears to me that that would be a mere over-refinement, and consequently, having regard to the decisions which I have mentioned, I think that the right to distrain exists, and that effect ought to have been given to it.

The only other point is this. The proviso in the first mortgage is "for the purpose of better securing the punctual payment of the interest of the said principal sum, he the mortgagor doth hereby attorn tenant to the mortgagees of the hereditaments and premises hereby demised at the clear yearly rent of £399," and so on. It is argued on behalf of the Respondent that certain fixtures which were affixed to the house by the mortgagor after the date of the first mortgage became, after the bankruptcy, the property of the trustee; in other words, that he is to be treated as a tenant and the mortgagees as landlords, and nothing more, the fixtures in question being trade fixtures paid for out of the mortgagor's own moneys, and it was said that the mortgagees were bound to elect between their character as mortgagees and their

character as landlords. But really, independently of *In re Stockton Iron Furnace Company* (1), which appears to me to govern this point also, on principle that cannot be the real meaning of the contract between the parties. The very words are, "for better securing the punctual payment of the interest," not to destroy the position of mortgagee, and, as was pointed out in that case by Lord Justice *James* and Lord Justice *Bramwell*, the mortgagee becomes mortgagee in possession, and liable to account as such. There is not any case of election between two characters. He remains mortgagee, with all the incidents which attach to that position. The attornment is a superadded security, and there is nothing, therefore, as to which he must elect. It is merely an additional security. That is the bargain between the parties. Therefore it appears to me that the mortgagee still retains the same rights in regard to the fixtures as if no attornment clause had been inserted, and consequently that all the fixtures are comprised in the security.

JAMES, L.J.:—

I concur.

LUSH, L.J.:—

I am entirely of the same opinion. I would observe that *Morton* v. *Woods* (2) governs the present case entirely, unless there is some distinction to be found on the ground that here the mortgagor had already attorned and agreed to stand in the relation of tenant to the first mortgagees. *Morton* v. *Woods*, I may also say, is supported by the case of *In re Stockton Iron Furnace Company* in this Court, the decision in which is exactly on the same ground and to the same effect upon both points.

Now is there any distinction? Does the fact that the mortgagor had already agreed to stand in the relation of tenant to a first mortgagee disqualify him from creating the same relationship between himself and a second mortgagee? I cannot imagine any principle of law which would prevent a person, if he chooses to do so, from undertaking that relationship to two distinct persons. The object of each attornment is perfectly clear. It is to secure

(1) 10 Ch. D. 357. (2) Law Rep. 3 Q. B. 658; Ibid. 4 Q. B. 293.

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the interest payable on the mortgage debt, and if there is no distinction on that ground, then there is no distinction whatever between the present case and *Morton* v. *Woods* (1) or *In re Stockton Iron Furnace Company* (2).

Now as to the fixtures, I entirely agree with what has been said. The object of the attornment was the further security of the mortgagee. Then everything that the mortgagor adds to the house to improve its value must be taken to be an accretion for the benefit of the mortgagee. The mortgagor does not become tenant for all purposes, as if there were no other relation between the parties. The relation is only created as subsidiary to the mortgage, and is to operate as an additional and better security to the mortgagee. Therefore all the fixtures which were added afterwards must be taken by him in his capacity of mortgagee and pass to him by the mortgage.

Solicitors for Appellants: *Hawks, Stokes, & McKewan.*
Solicitors for Trustee: *Hindson Miller & Vernon.*

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OCEANIC STEAM NAVIGATION COMPANY *v.* SUTHERBERRY.

[1879 O. 119.]

Administrator—Underlease with Option of Purchase—Breach of Trust.

1 Ch.D 178
26 Ch.D 626

In dealing with the leaseholds of a testator or intestate, an executor or administrator may grant an underlease, if necessary for the due administration of the property, but cannot give an option of purchase at a future time.

An administrator granted an underlease of a leasehold estate of his intestate, with an option of purchase to the underlessee within seven years at a fixed price:—

Held (affirming the decree of the Vice-Chancellor of the *Lancaster* Court), that the option of purchase was *ultrà vires*, and could not be supported against the next of kin, although it appeared from the evidence to be advantageous to the estate.

THIS was an appeal from a judgment of Mr. *Little*, the Vice-Chancellor of the Duchy of *Lancaster*.

(1) Law Rep. 3 Q. B. 658; Ibid. 4 Q. B. 293. (2) 10 Ch. D. 357.

The property which formed the subject of the suit consisted of a shipwrights' yard in *Neptune Street* and *Howard Street, Liverpool.*

In August, 1861, the property was leased by the Corporation of *Liverpool* to *Hannah* and *Alfred Waterhouse* for seventy-five years, at a peppercorn rent; and it was assigned by the lessees to *William Lawrence Sutherberry*, the elder. He assigned the lease to the Defendants, *North* and *Brierley*, by way of mortgage, for £3500.

W. L. Sutherberry, the elder, died in June, 1872, intestate, leaving three children his sole next of kin, namely, *W. L. Sutherberry, Jane Harriet Thomson*, and *Helena Sutherberry*. *Jane Harriet Thomson* was married at the time of her father's death, but *Helena* was unmarried.

W. L. Sutherberry took out administration to his father's estate. On the 1st of January, 1873, with the concurrence of the mortgagees, *North* and *Brierley*, he granted an underlease of the leasehold property, which was called in question in the action.

The underlease was made between *North* and *Brierley* of the first part, the Defendant *W. L. Sutherberry* of the second part, and the Plaintiff company of the third part. It did not allude to the title of *Sutherberry* as the administrator of his father, but recited that he was possessed of or otherwise well entitled to the property for the residue of the term of seventy-five years, subject to the mortgage, and the parties of the first and second parts demised the property to the company for the term of twenty-one years from the 1st of December, 1872, at the yearly rent of £500, payable half yearly, and subject to certain covenants and provisions therein set forth. The proviso on which the question in the suit turned was the following:—

"Provided always, and it is hereby declared, that the said *A. North, J. Brierley*, and *W. L. Sutherberry*, or any of them, their or any of their executors, administrators, or assigns, shall not, nor will at any time before the 1st day of December, 1879, sell the said demised premises, or any part thereof, or any term or interest therein, without first offering the said premises to the company for the residue of the said term of seventy-five years at the price or sum of £6500 (freed and discharged from the said mortgage and from all future liability under this demise), and

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allowing them three months for determining on the acceptance of such offer; and the said company shall in like manner, at any time before the said 1st day of December, 1879, and before the said premises shall be sold as aforesaid, have the option of purchasing the same at the price aforesaid for the said residue of the said term upon giving three months' notice to the said *A. North*, *J. Brierley*, and *W. L. Sutherberry*, or any or either of them, or them or any or either of their executors, administrators, or assigns."

After taking possession of the property, and principally in the year 1874, the Plaintiffs proceeded to erect various expensive buildings upon the site demised to them. On these works they expended more than £11,000, thereby greatly adding to the value of the property.

On the 18th of September, 1872, *Helena Sutherberry* married *J. Kennedy*, and conveyed her one-third share to trustees upon the usual trusts of a marriage settlement. *J. Kennedy* died without issue of the marriage.

On the 27th of September, 1872, Mr. and Mrs. *Thomson* assigned their beneficial interest in one-third of the leasehold premises to trustees upon certain trusts.

By an indenture of the 7th of April, 1874, while Mrs. *Kennedy* was still a widow, *W. L. Sutherberry*, in consideration of £1000, sold to her all his one-third share in the leasehold premises, and at her request assigned it to the trustees of her marriage settlement.

On the 30th of June, 1875, *Helena Kennedy* married *J. Bore*.

On the 29th of May, 1878, the company served the lessors with notice of their intention to exercise their option of purchase. An abstract of title was accordingly delivered, and the draft conveyance prepared. But in consequence of the trustees of Mrs. *Thomson's* and Mrs. *Bore's* settlements refusing to concur in the conveyance, it became necessary to bring the present action for specific performance of the agreement. *W. J. Sutherberry*, Mr. and Mrs. *Thomson*, Mr. and Mrs. *Bore*, the trustees of their respective settlements, and the mortgagees, were made Defendants to the action.

Mr. and Mrs. *Bore* and their trustees, in their defence, after

denying the right of *W. L. Sutherberry* to bind their rights, made the following submission:—

"These Defendants are ready and willing to deal with the original share of the Defendant *W. L. Sutherberry* in the said premises as this Court shall direct: and if this Court shall so direct, upon the Plaintiffs entering into a proper covenant with them for indemnifying them against the one-third of the mortgage debt and paying to the Defendants [the trustees] the sum of £1000, these Defendants are ready and willing to assign the same original one-third to the Plaintiffs, or as they may direct."

At the trial of the action before the Vice-Chancellor of the *Lancaster* Court, evidence was given that the property was formerly sublet at a rent of £384; that it had remained unlet for some time previous to the grant of the underlease to the Plaintiffs; that it had been valued by a competent valuer at £6000; and that it had been put up for auction by the administrator without finding a purchaser.

The Vice-Chancellor, however, held that the administrator had no power to make the contract, and that in so doing he had committed a breach of trust, and he dismissed the action with costs (1).

(1) 1880. March 8. LITTLE, V.C., after stating the facts, said:—

The relations of an administrator and the next of kin of an intestate are those of a trustee and *cestui que trust*. A Court of Equity will not enforce against a trustee the specific performance of a contract which in its constitution involves a breach of trust. It is not necessary for the purposes of this case to consider what may be the limits of an administrator's power of leasing. That an administrator, equally with other trustees to whom the sale of property is committed either by law or by the author of a trust to whom no express power of leasing has been given, must by law inferentially take some power of leasing, I think manifest, because otherwise the property must remain unproductive to the *cestui que trust* until sale. I assume that the underlease in this case, considered merely as a demise of the property for twenty-one years at the rent reserved (in which point of view it has not been hitherto objected to by the Defendants), may, perhaps, be free from objection, or may be capable of being supported by the Plaintiffs, if hereafter objected to by the Defendants. But if so, still I do not think that that circumstance can operate to make the option clauses of this instrument binding on the intestate's estate, supposing that they would not be binding if standing by themselves. Upon principle I think these clauses cannot bind the estate. There is no doubt of the administrator's power of alienation when exercised in a due

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From this decision the Plaintiffs appealed.

Sir *H. Jackson*, Q.C., and *Neville*, for the Appellants:—

The executor or administrator has a wider power than a mere trustee for sale. He has an absolute title at law and in equity to

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course of administration of the estate. These clauses do not by themselves effect an alienation. They amount only to a restriction imposed by covenant upon the administrator's power of sale to a third person for the limited period of time which is specified—a thing which appears to me objectionable in itself—and they amount further to a continuous offer by the administrator of the property for sale to the Plaintiffs during the same limited period at the specified price. It is true, as was pointed out by Mr. *Neville*, that the restriction on the saleability of the property is not so great in point of time as on a cursory reading of the clauses it might be supposed to be, because the administrator might at any time after the execution of the underlease have given the three months' notice, which, if given, must end either in the purchase of the property by the company on the expiration of that notice, or otherwise in the release of the property at that time from the restriction upon a sale of it to a third person. But then it must be observed on the other hand, that the restriction upon a sale to a third person, even for such a period as three months, may possibly operate very injuriously in the way of the sale of the property to an outside purchaser, and especially when so coupled with the circumstance which exists in this case, that such a purchaser could not get possession of the property till after the expiration of the twenty-one years' term of the lease. The Plaintiffs are not able to produce any authority which tends to support their case—of the obligation of a contract or option of this description when given by an administrator. But on the other side there is the decision of Sir *James Parker* in *Clay* v. *Rufford* (5 De G. & Sm. 768), in which he held it to be clear, and clear beyond the point of reasonable argument, that a trustee could not, through the medium of such an option clause as we have in this case, enter into, as he expressed it, "a contract to sell at a future time at a price now fixed, without exercising any judgment whether the thing was beneficial or not at the time of sale." I think also that the case of *Magrane* v. *Archbold* (1 Dow. 107), in which Lords *Eldon* and *Redesdale* agreed in holding that the interests of the children of an intestate in leasehold property could not be held to be bound by the administrator's covenant to grant what they considered an improvident renewal of a lease, and also *Bellringer* v. *Blagrave* (1 De G. & Sm. 63), in which Vice-Chancellor *Knight Bruce* held that it was *ultrà vires* of trustees with a power of leasing to enter into a covenant for renewal of the lease on payment of a fixed sum, also tend to support the same conclusion.

There is another point also which I ought to mention. I have observed upon the circumstance that the administrator is not described by the title of his office in the underlease, and that the company necessarily had indirect notice of the rights of the next of kin. But I think the matter goes further than that, for I must add that there are some letters in evidence in the case

dispose of the leaseholds, and a purchaser cannot oblige him to produce evidence that the sale is necessary for the administration of the assets: *Bacon*, Abr. tit. L. (1); *Williams* on Executors (2). He may also grant an underlease if beneficial to the estate. In *Keating* v. *Keating* (3) the lease granted by the executor was set

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which bring notice to the company and their solicitors, or at all events knowledge home to them, that the family were averse to the sale of the property, and under these circumstances it appears to me that the company were called on to exercise greater caution than has been displayed in the manner in which this lease has been prepared and executed.

There was a subordinate point made at the bar by the Plaintiffs' counsel, namely, that if the Plaintiffs' case failed as respects the claim for specific performance of the covenant to the full extent, still the company would be entitled to the specific performance to the extent, as it was expressed, of that one-third of the property which belonged to the administrator as one of the next of kin, and with a proportionate abatement from the purchase-money. I am disposed to do, and will do, everything that I can to give to the company the benefit of the contract as applied to the administrator's beneficial interest. But I have got before me only a specific performance founded on the option clause and applying to the property merely as an entirety. There are no pleadings addressed to this alternative view of the Plaintiffs' rights; but I would authorize, and gladly authorize, any amendment of the pleadings which could be suggested by the Plaintiffs, keeping within the lines of the evidence which was given at the trial, if that would support the Plaintiffs' title to that limited degree of relief to which I am now addressing myself. But I have not had it pointed out to me how this can be done, and on consideration of the subject myself, I do not see my way to its being done. The contract was a contract which required the extinction of the mortgage debt, and that mortgage debt is not only a mortgage debt operating to charge the mortgaged property, but it is also a personal debt of the intestate, that is to say, it is a debt which charges the whole of the intestate's estate, and also the administrator to the extent of the whole of his receipts. We have not the slightest information before the Court as to the state of circumstances connected with the administration of the intestate's estate, beyond what appears as respects this particular leasehold property. There may be other debts which may require to be provided for besides this particular mortgage debt. Again, I am wholly uninformed as to how, as between the next of kin themselves, their interests under the intestacy have been dealt with, further than as appears in part from the deeds which are in evidence, one of them being a deed executed by the administrator in favour of the trustees of Mrs. *Bore's* settlement, by which the administrator has affected to sell his one-third, as one of the next of kin in this particular leasehold property, to those trustees, with notice to

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(1) Sect. 7. (2) 6th Ed. p. 878.
(3) Ll. & G. temp. Sug. 133.

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aside, but Lord Chancellor *Sugden's* judgment is in our favour, for he says that he would uphold such a lease if it were beneficial. In the present case there cannot be a doubt on the evidence that the contract was a beneficial one. It is true that in *Clay* v. *Rufford* (1), on which case the Vice-Chancellor rested his decision, it was held that a trustee for sale could not give a future option of purchase at a price fixed; but an administrator stands on a different footing from a trustee for sale, who cannot go beyond his express powers.

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them of the underlease. Very grave difficulties present themselves to my mind as to what the result of this is in a legal point of view. A case which made a great impression on me early in my experience at the bar, was the case of *Clegg* v. *Fiskwick* (1 Mac. & G. 294). In that case Lord *Cottenham* had to consider the effect of a somewhat similar transaction by an administratrix. Lord *Cottenham* there held that even an actual assignment by the administratrix of an intestate of the whole of the intestate's shares in the colliery partnership, and in the leases and assets of the partnership, to the next of kin, to be taken in satisfaction of their shares under the intestacy, was not legally operative to bind the intestate's interests in the partnership or in the partnership assets, or her right of suit in relation to them, and the grounds on which he rested his decision were these —that there remained behind that assignment to the next of kin a duty of administration to be discharged by the administratrix as between the estate of the intestate and the partnership. In this case there yet remains, for anything that I know, by the Defendant *Sutherberry*, as administrator in respect of this leasehold property, a duty both to the intestate's creditors and to his next of kin. Certainly we have on the face of the case the fact that this mortgage debt of £3500 has not yet been paid, and that debt, and any other unpaid debt, if any, must be paid before the next of kin are entitled to any specific interest in this leasehold property, and then after that there would remain to be made an adjustment of the interests of the next of kin *inter se*. These difficulties have pressed so much on my mind, that I find myself unable to do what I should wish to do towards carrying out a sale of the specific one-third of the administrator in his own right as one of the three next of kin in this particular leasehold property, on the foot of this contract, and that is simply because in my judg- his interest is not in law specific, but it is general, and remains the subject of account. Therefore it appears to me that all I can do on the subject of this action is to guard against the sacrifice of any interest which the Plaintiff company may be entitled to assert founded upon the contract, either in an administration suit or in any other litigation which may arise, so far as the contract may be available, if it is available, against the administrator or his assignees in interest, in respect of his share as one of the next of kin; and in dismissing this action, I shall dismiss it without prejudice to any such question. This may be expressed in any terms which the Plaintiffs' counsel may suggest. He may express it as largely as he likes.

(1) 5 De G. & Sm. 768.

The option for purchase and the underlease were all one contract, and the administrator could not have disposed of the property at all unless he had made this arrangement. If the estate had been administered by the Court, the arrangement would certainly have been sanctioned. Great injustice will be done to the Plaintiffs if they are deprived of their purchase after having laid out so much money on the buildings.

At all events the Plaintiffs are entitled to the share to which the administrator was beneficially entitled, on payment of one-third of the agreed purchase-money.

F. Thompson, for the administrator.

North, Q.C., *Clare*, *Gazdar*, and *S. Hall*, for the other next of kin and their trustees.

J. P. Lake, and *Arkcoll*, for the mortgagees.

The counsel for the Respondents were not called on.

JESSEL, M.R.:—

I am afraid we cannot call on you, Mr. *North*. I say so with regret, because I fear that the Court is committing, I will not say an injustice, because we are deciding according to the law, but what looks like a great hardship upon the Plaintiffs. However, I am quite unable to dissent from the conclusion of the Vice-Chancellor. An administrator is considered in a Court of Equity as a trustee, and his primary duty is to sell the intestate's estate for the payment of his debts. It is quite true that, having the legal estate in the leaseholds, he may in some cases underlet them, and the underlease will be supported in equity as well as in law. But that is an exceptional mode of dealing with the assets, and those who accept a title in that way must take it subject to the question whether it was the best way of administering the assets. In the present case it may be that the letting of this property at £500 a year was a proper letting, it having been put up for sale and not sold; but the question is not whether this was a proper rent, but whether it was right to insert an option of purchase so as to fetter the exercise of the trust for sale by preventing

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the administrator from selling the property to any one but the Plaintiffs for a period of seven years at a price then fixed. It appears to me that it would be dangerous to hold that an administrator could do this, a mere trustee whose duty was to sell within a reasonable time. In the case of an ordinary trustee it is clear that no such option could be given by him; and although an administrator is not an ordinary trustee, still he is in a similar position, and to support what has been done in the present case would, in my opinion, be not only a great extension, but an unauthorized and unwarranted extension, of the powers hitherto understood to be reposed in an administrator. Therefore the agreement must be declared to be a breach of trust, and specific performance of it cannot be enforced.

There are, no doubt, very special circumstances in this case. It was known that the company intended to build on the property, and they began at once to do so, and have increased its value by some thousands of pounds. I have no doubt that the price fixed was a fair one at the time. I agree that the mere fact of the outlay by the Plaintiffs cannot alter the position of the parties in a Court of Equity, though outside the Court it might be thought to have a bearing on the justice of the case. Therefore I concur, though with reluctance, in the conclusion to which the Vice-Chancellor has arrived.

JAMES, L.J.:—

I am also of opinion that if we were to reverse the judgment of the Vice-Chancellor we should be affording an illustration of the maxim that hard cases make bad law. This is certainly a case of singular hardship, but we must not, because of the hardship in a particular case, do the great mischief of shaking the fixed rules of law, and it appears to me that the principles on which this case must be decided have been settled by the authorities.

For the purposes of this case I can see no difference between an executor or administrator and any other trustee. The only distinction that I am aware of is this, that the law does not expect an executor or administrator to give evidence to a purchaser, or enable a purchaser to require evidence from him, that what he is doing is necessary for the due execution of his trust. With that

difference he is exactly in the position of a trustee. He has power to give receipts, and the purchaser has no right to require from him evidence that a sale is actually required. In my opinion it would be most dangerous if a trustee could enter into a contract for sale binding the estate for some years afterwards, whatever might be the alteration in the value of the property. It makes no difference that the administrator granted an underlease at the same time, and that he had power to grant an underlease. In my opinion the agreement was a violation of the rules which have been laid down for the guidance of trustees in the exercise of their duty, and the mere fact that the agreement was a beneficial one would not justify the Court in upholding it. Therefore, with great regret, I think that the appeal must be dismissed.

LUSH, L.J.:—

If I felt at liberty to give judgment according to the real merits and justice of the case, I should not hesitate to decide in favour of the Plaintiffs. The administrator had the property valued for the purpose of the sale at £6000, and he put it up for sale and got no offer, and it did not appear that he could get any other tenant for it. I think that the rent of £500 was a beneficial one, and the price which the company agreed to give for the purchase was £500 more than the valuation. It was known to the administrator that the company intended to build on the land, and that, by reason of the increased value of the land, it would be their interest to exercise their option of purchase. Further, I think that if the lease had not been granted and the property had been put up for sale at the end of seven years, it would not have fetched more than £6500. Therefore I have come to the conclusion that the bargain which the administrator made for letting or selling the property was the best that could have been made under the circumstances. It seems to me a case of peculiar hardship that the company should lose the benefit of the buildings which they have erected. If, however, it is the doctrine of a Court of Equity that an administrator is regarded as a trustee, and if the making of a contract of this kind is a breach of trust, and if a breach of trust, however beneficial it may turn out to be, cannot be condoned, there is nothing more to be said than that the

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agreement cannot be enforced, and the Plaintiffs must lose the benefit of their expenditure. That these are the fixed principles of a Court of Equity I cannot doubt after what my learned brothers have said, and therefore, with much reluctance, I must assent to the judgment.

19 Ch D 178

THE COURT added to the Vice-Chancellor's order a declaration that the Appellants were entitled to an assignment of one-third of the property, the beneficial interest of the Defendant *Sutherberry*, upon payment of one-third of the agreed purchase-money. The Appellants were ordered to pay the costs of the appeal.

Solicitors for Plaintiffs: *Williamson, Hill, & Co.*, agents for *Rae & Thompson, Liverpool.*

Solicitors for Defendants: *Gregory, Rowcliffes, & Rawle*, agents for *Hill & Dickinson, Liverpool; Field, Roscoe, & Co.*, agents for *Rowe & Pemberton, Liverpool; Miller, Peel, & Hughes, Liverpool; Norris, Allens, & Carter*, agents for *Simpson & North, Liverpool.*

C. A. 1880 — Nov 24.

In re GREAT BRITAIN MUTUAL LIFE ASSURANCE SOCIETY.

Company—Winding-up—Jurisdiction—Mutual Life Assurance Society—Liability of Members—Disputed Claim—Evidence—Reduction of Amount of Contracts—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 91—*Life Assurance Companies Act*, 1870 (33 & 34 *Vict. c.* 61), *ss.* 21, 22.

17 C.L.D. 602
602.-7
19 C.D. 42
20 C.D. 406

The Court has, by virtue of sect. 2 of the *Life Assurance Companies Act*, 1870, jurisdiction to wind up an unregistered mutual life assurance society under the *Companies Act*, 1862.

But, *semble*, that the holders of policies in such a society are not liable to contribute to the payment of any debts; and that all that can be done in the winding-up is (after payment of the costs) to distribute the funds of the society among the policy-holders in proportion to the amounts of their respective claims.

When a company respondents to a winding-up petition dispute the validity of the petitioner's debt they must adduce on the hearing such evidence as will shew the Court that there is a question to be tried. If they fail to do this, a winding-up order ought to be made.

Two petitions having been presented by policy-holders for the winding-up of a mutual life assurance society, the society admitted their insolvency,

and a winding-up order was made on the second petition, on the ground that the validity of the first petitioner's debt was disputed. But liberty was given to the first petitioner to apply for the costs of her petition, if her claim should be ultimately established. She appealed, and before the appeal came on for hearing a committee of policy-holders was formed, who desired that the Court should exercise the power given to it by sect. 22 of the *Life Assurance Companies Act*, 1870, of reducing the amount of the contracts of the society instead of making a winding-up order:—

Held, that this power could not be exercised so long as the winding-up order remained, and that the order ought to be discharged, and a meeting of the policy-holders summoned in order to ascertain their wishes.

And the further hearing of the appeal was adjourned until after the meeting should have been held.

THIS was an appeal from an order made by Vice-Chancellor *Hall* for the winding-up of the *Great Britain Mutual Life Assurance Society*.

The Society was a mutual life assurance association, and was constituted under the provisions of a deed of settlement, dated the 12th of February, 1844, which provided (by clause 1) that the several persons parties thereto and the several other persons who should thereafter be desirous of becoming members of the Society and for that purpose should effect assurances with the Society, or should be admitted members of the Society in the place and stead of any members for the time being of the Society as thereinafter provided, should (so long as the respective assurances should be kept up and be in force) be and continue, until dissolved under the provisions thereinafter for that purpose contained, a company or society under the above name.

Clause 4 provided that the business or purpose of the Society was to be to grant or effect assurances on lives and survivorships, and other legal assurances on events and contingencies connected with life; to purchase and sell life and other annuities of every description; to grant and assure endowments for widows, children, and other persons; and generally to effect all such transactions, matters, and things (other than and except fire and marine assurance) as could be effected by an assurance company or society.

By clause 140 it was provided that no member of the Society (whether an officer of the Society or not), nor any person claiming under him or her, should be personally liable to make good, either in whole or in part, any claim or demand whatever under any

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policy, grant of annuity, endowment, or other assurance, issued or to be issued on behalf of the Society, but the funds or property of the Society which at the time of recovering upon any such claim or demand, policy, annuity, endowment, or other assurance, should be in the hands or power of the directors (including the guarantee fund thereinafter mentioned and provided, if it should be necessary to resort thereto for the purpose), and not for the time being required to pay or satisfy any prior claims or demands upon the Society, should alone be liable to satisfy such claim or demand, policy, annuity, endowment, or other assurance.

Each policy issued by the Society contained a clause limiting the liability in respect of it in accordance with clause 140.

The guarantee fund referred to in that clause consisted of a sum of £25,000 which was contributed by the first directors of the Society. This fund was to last for five years, and was then to be repaid to the persons who had contributed it, and it was provided that it might be repaid sooner out of the other funds of the Society.

There was no share capital.

The Society was never registered under the Companies Acts.

On the 28th of October, 1880, a petition for the winding-up of the Society was presented by Mrs. *Popham*, the mother and administratrix *de bonis non* of Mr. *Harcourt F. P. Popham*, deceased, who as such was the holder of a policy for £5000 which was issued by the Society on the 23rd of February, 1872, on the life of the son against that of the mother. The son died on the 16th of April, 1879. A claim for the £5000 was made upon the Society, but they resisted payment on the allegation that at the time when the policy was granted the son was of intemperate habits, and that this fact was concealed from the Society, and a representation made that he was temperate in his habits. Ultimately Mrs. *Popham* commenced an action against the Society for the £5000. The Society made an offer to compromise for £2500, but this offer was refused. The action was still pending when the petition was presented. On the hearing of the petition a number of affidavits were filed on behalf of the Petitioner to prove that at the time when the policy was granted the son was temperate in his habits and that he did not take to drinking

until several years afterwards. In opposition to this evidence the Society produced no evidence, except that of the belief of some of their officers. This petition was presented at the Rolls, but was afterwards, by an order of the Lord Chancellor, transferred to the Court of Vice-Chancellor *Hall*, in which another petition had been presented.

The second petition was presented on the 30th of October, 1880, by Messrs. *Mordaunt Brothers*, who were the holders of a policy for £1000 granted by the Society on the 7th of October, 1875, on the life of a Mr. *Swan*, who was still living. This policy was originally taken out by a person who had advanced money to the son, as a security for the loan, and was afterwards assigned to Messrs. *Mordaunt Brothers*.

The two petitions came on together for hearing by Vice-Chancellor *Hall* on the 19th of November, 1880.

Hastings, Q.C., and *Boome*, for Messrs. *Mordaunt*.

Ince, Q.C., and *A. Beddall*, for Mrs. *Popham*.

W. Pearson, Q.C., *Kekewich*, Q.C., *Robinson*, Q.C., *B. Fossett Lock*, and *A. Dunham*, for policy-holders.

Eddis, Q.C., and *W. W. Karslake*, for the Society, admitted their insolvency, and did not oppose the making of a winding-up order.

HALL, V.C.:—

I think at present that there is a *bonâ fide* dispute as to the claim of Mrs. *Popham*. But the important consideration is this, that I cannot regard it as a frivolous or sham objection. That being so, the material point is as to Mrs. *Popham's* costs. Now, as regards that, the right course would be that if she shall eventually maintain her claim upon the policy which she holds, then she should have, without further discussion, the costs of her petition. I do not propose to give her the carriage of the proceedings. Under the circumstances of the case I shall give the carriage to the Petitioner in the second petition, not at all questioning the ordinary rule. But, although I do not give the first Petitioner the carriage

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of the order, and do not make the order on her petition, I think I may give her the costs of her petition, provided that she ultimately supports her claim.

An order to wind up the Society was accordingly made on the petition of Messrs. *Mordaunt*, and liberty was given to Mrs. *Popham* to apply for her costs of her petition if her claim should be ultimately established.

The Vice-Chancellor afterwards, on the same day, appointed Mr. *F. B. Smart* provisional liquidator, to receive and give discharges for the premiums payable.

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Mrs. *Popham* appealed from the winding-up order. The appeal was heard on the 24th of November, 1880.

Before the hearing, a committee of policy-holders had been formed, who desired that the Court should, in place of making a winding-up order, exercise the power given to it by sect. 22 of the *Life Assurance Companies Act*, 1870, of reducing the amount of the contracts of the Society. The policies in existence were for sums amounting altogether to more than £2,000,000.

Ince, Q.C., and *A. Beddall*, for the Appellant:—

The winding-up order ought to have been made on the first petition. The dispute as to the debt is not a *bonâ fide* one; and, at any rate, there is no evidence on the part of the Society which meets our evidence of the state of health of the assured. The reconstruction of the Society which is suggested by the committee of policy-holders cannot be effected now, for the power of reducing the amount of the contracts given to the Court by sect. 22 (1) is

(1) Section 2 provides that "the term company means any person or persons, corporate or unincorporate, not being registered under the Acts relating to friendly societies, who issue or are liable under policies of assurance upon human life within the *United Kingdom*, or who grant annuities upon human life within the *United Kingdom*."

Sect. 21 provides that "the Court may order the winding-up of any company, in accordance with the *Companies Act*, 1862, on the application of one or more policy-holders or shareholders, upon its being proved to the satisfaction of the Court that the company is insolvent."

Sect. 22: "The Court, in the case of a company which has been proved to

instead of making a winding-up order. It does not arise after a winding-up order has been made.

Hastings, Q.C., and *G. Cave*, for the second Petitioner:—

Our petition was not a collusive one. It was presented for a *bonâ fide* purpose. The company took out a summons for leave to pay us the value of our policy, and we should willingly have assented to this. But another policy-holder obtained an injunction restraining the directors from entering into compromises. Under the circumstances the order was properly made on our petition, but it was not intended to exclude the possibility of an order being made under sect. 22 for the reduction of the policies.

[JESSEL, M.R.:—This is an unregistered company. How do you shew that there is any power to make a winding-up order at all? I cannot find that there is any liability on any one to contribute to the payment of debts.]

The Society is a partnership or association within sect. 199 of the *Companies Act*, 1862. Orders have frequently been made for the winding-up of similar societies. Sect. 21 of the Act of 1870 clearly gives jurisdiction: *Buckley's* Companies Acts (1), and the cases there cited.

[JESSEL, M.R.:—Is there any case in which the point was argued? The question is whether sect. 21 of the Act of 1870 does not mean merely that companies may be wound up which could have been wound up under the Act of 1862?]

Section 2 defines the meaning of the term "company" in sect. 21. And if sect. 21 does not apply, neither can sect. 22. And a large proportion of life assurance companies are constituted in a way similar to this company.

THE COURT (*Jessel*, M.R., and *James* and *Lush*, L.JJ.) held that there was jurisdiction under sect. 21 to make a winding-up order.

Robinson, Q.C., and *B. Fossett Lock*, and *A. Dunham*, for

be insolvent, may, if it thinks fit, reduce the amount of the contracts of the company, upon such terms and subject to such conditions as the Court thinks just, in place of making a winding-up order."

(1) 3rd Ed. p. 550.

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policy-holders, expressed their assent to the scheme proposed by the committee.

Davey, Q.C., for the Society and for policy-holders to the amount of £100,000, asked that the winding-up order might be discharged, and said that the directors were willing to call a meeting of the policy-holders for the purpose of considering whether they would wish the Court to exercise the power of reducing the amounts of the policies.

Ince, Q.C., suggested that the winding-up order should remain, and that the proceedings under it should be stayed.

[JESSEL, M.R.:—The power of reducing the contracts is given instead of making a winding-up order.]

JESSEL, M.R.:—

I think it important to say, for the comfort of the holders of policies in this company and in other similarly constituted mutual societies, that I do not find there is any liability whatever imposed upon them to contribute one farthing. There is no contract on their part to pay anything. The form of the arrangement come to upon the establishment of the Society and the substance of it is this—that all the policy-holders shall pay the premiums upon their policies and nothing more; that, out of the moneys so paid, the current expenses of the Society, such as clerks' salaries and servants' wages, and so forth, are to be paid by the directors, and out of the surplus the policies are to be paid as they become claims, and for that purpose and that purpose only the premiums are to be collected and invested by the directors. There is, of course, no obligation upon the policy-holder to continue his payments. If he likes to drop his policy or to surrender it, he may do so, and therefore what we have to consider is, really, the mere question of distribution. That is, when the company becomes insolvent and is ordered to be wound up, the only matter to be decided, after the payment of the costs of the liquidation, is in what proportions the funds and property then belonging to the Society shall be distributed amongst the then policy-holders.

Now, bearing that in mind, we have to deal with this case.

First of all there is the case of a policy-holder whose policy has become a claim. The company have disputed the claim. I have not a word to say at present with regard to the *bona fides* of the dispute. I will assume that the directors, advised by their solicitor, thought it proper to dispute the claim. But the claim was disputed upon the ground of fraudulent misrepresentations of the state of health of the assured. Of course the obligation of proof is upon the company. But the Petitioner, by anticipation, has produced evidence—very strong evidence if not met—to shew that the representation made as to the sobriety of the assured was correct. That has not been met at present by any evidence at all, and in my opinion it is not sufficient for the Respondents, upon a petition of this kind, to say, "We dispute the claim." They must bring forward a *primâ facie* case which satisfies the Court that there is something which ought to be tried, either before the Court itself, or in an action, or by some other proceeding. If the matter, therefore, had depended simply on that question, unless the Respondents had asked for an opportunity to adduce further evidence, I should have thought that the order for winding up ought to have been made upon the petition of the policy-holder. There was a second petition by the holders of another policy. I am not now in a position to give any opinion as to the causes which led to the presentation of that petition. Looking at the amount of the policy, at the fact that it was a current policy—considering that the life assured was a young life, and that the policy had been in existence only five years, and that it was obtained by a creditor as a mere security for his debt, I am not at all satisfied that those Petitioners have any real interest in this matter. They do not tell us that the debtor who gave the security is insolvent or cannot pay his debt. If he can, this, of course, would prevent the Petitioners from having any interest at all. Nor do they tell us that they had the policy valued, or that anybody told them it would be worth anything. I believe that these petitions are presented, not from philanthropic motives, but from interested motives, and if it should turn out that these Petitioners have no real or substantial interest in the matter, the only other conclusion I can come to is, collusion having been disproved, that the petition was presented with a view of obtaining costs, and very large costs,

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by those who presented it. I do not intend conclusively to say that it is so, but I am sorry to say I am not satisfied that it is not so. That is the petition on which the winding-up order has been made. If the matter had been before me as an opposed petition, I should have examined the Petitioners and their solicitors in the box *vivâ voce*, and I should have endeavoured in that way to ascertain under what circumstances the petition was actually presented. It is not always possible for a Judge to get behind the scenes, but I have occasionally been able to do so by adopting that course. The company, however, appeared on the hearing of the petitions and admitted their insolvency. But, since the hearing by the Vice-Chancellor, a body of policy-holders, to whom, and not either to the solicitors or to anybody else who may be concerned in these petitions, the property in question belongs, have come forward and say, "Put in force the powers conferred upon the Court by the 22nd section of the *Life Assurance Companies Act*, 1870, of reducing the amount of the contracts, which will enable the company to go on, it being now insolvent. Supposing, for instance, it was shewn to the satisfaction of the Court that it would become solvent by reducing the policies to two-thirds or one-half of their amounts, and the policy-holders say, "We would rather go on thus and make it a solvent and prosperous company, than get the small return which at the utmost we can hope for if the winding-up proceedings continue." That view is supported by a committee of policy-holders holding above £100,000 worth of policies. That is, no doubt, not a very large proportion, but it is a substantial proportion of the whole of the holders of the policies of the company, which amount, as I understand, to be upwards of £2,000,000.

Under these circumstances, what ought the Court to do? It appears to me, considering the enormous loss that will be inflicted upon these unfortunate policy-holders if we were to wind up the company, giving them each only a small fraction of the estimated value of their policies; that persons, many of whom from advancing age or infirmity may not be able to effect fresh policies in other societies, will, if the company is allowed to go on with a reduction of contracts, eventually receive the full amount of the reduced values of their policies, paying their premiums during

their lives, which would be a very great benefit and advantage to them, besides other advantages which they may obtain in the shape of bonuses, if the Society should ultimately prove more prosperous than is anticipated,—it appears to me that under these circumstances the Court should exercise the power given to it by sect. 91 of the *Companies Act*, 1862, which enables it to ascertain the views of the real owners of the property as to the mode of disposition thereof by calling a meeting of the policy-holders, and we shall then know whether the policy-holders prefer carrying on the company with a reduction of the amounts payable under their policies, or prefer its being wound up by what, I am afraid, is a very expensive jurisdiction, and the distribution among them of the small amount, if anything, which will then remain to be divided.

We propose therefore to discharge the winding-up order; to continue the appointment of Mr. *Smart* as limited provisional liquidator in the manner provided for by the other order of the Vice-Chancellor, and to order this appeal to stand over to the second Wednesday in next Hilary Sittings, by which time the wishes of the policy-holders will have been ascertained.

JAMES, L.J.:—

I entirely agree in the order which has been suggested by the Master of the Rolls. It appears to me to be eminently calculated to avoid or, at all events, to diminish the mischief which a winding-up is calculated to produce. I would not have added anything to what the Master of the Rolls has said except for this reason: I desire most unequivocally to state that, in my judgment, an association of this kind is incapable of contracting any debt or liability whatever. It is a mere benefit society, the members of which contribute certain sums annually to a fund which is the property of the policy-holders, and all that can be done in the winding-up is to divide the assets of the Society amongst the *cestuis que trust*, the policy-holders, in proportion to the respective values of their claims, subject, I am sorry to say, to the payment of the costs which may be incurred in the winding-up, and which, I believe, have a great deal to do with the presentation of these petitions.

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LUSH, L.J.:—

I also entirely agree as to the form of order which the Master of the Rolls has mentioned, and which we are prepared to adopt.

I wish also to add that, as at present advised (I speak with that kind of reserve only because the question has not been argued before us), I have a very strong opinion indeed that no policy-holder in such a society as this can be made liable for any debts.

Solicitors for first Petitioner: *Longcroft & Myers.*

Solicitor for second Petitioners: *G. Blagden.*

Solicitors for Policy-holders: *C. P. Pritchard & Marshall; Harcourt.*

Solicitors for Committee: *Ashurst, Morris, & Co.*

C. A. 1880 Nov. 25.

In re STANLEY. *Ex parte* MILWARD.

Bankruptcy—Annulment—Registration of Resolution for Composition—Bankruptcy Act, 1869, *ss.* 28, 80, *sub-s.* 10—*Bankruptcy Rules*, 1870, *r.* 266.

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The Registrar has no power to register a resolution for liquidation or composition after an adjudication of bankruptcy has been made; unless the adjudication has been made under rule 266 of the Bankruptcy Rules, 1870, in which case the adjudication is intended to be merely ancillary to the liquidation.

Ex parte Davis (1) overruled.

W. M. STANLEY filed a petition for liquidation or composition on the 25th of September, 1880, in the *London* Bankruptcy Court.

On the 4th of October he was duly adjudicated bankrupt in the *Birmingham* County Court on the petition of Messrs. *Milward & Sons.* No stay of proceedings under the adjudication was directed.

On the 11th of October a resolution was passed by the creditors present at a general meeting to accept a composition of 6*d.* in the pound, and the resolution was confirmed at a second meeting on the 22nd of October.

(1) 2 Ch. D. 231.

The debtor's statement shewed debts to the amount of £2938, the only asset being £80 in cash. All the creditors were present and voted in favour of the liquidation, except Messrs. *Milward* and one other creditor.

Messrs. *Milward* opposed the registration of the resolution for composition before Mr. Registrar *Pepys* sitting as Chief Judge, but the Registrar ordered the registration to be made. From this decision Messrs. *Milward* appealed.

Finlay Knight, for the Appellants:—

We object to the registration on two grounds; first, that the composition was inadequate; but principally that the debtor was adjudicated a bankrupt before the passing of the resolution. There is no power given by the Act to register a resolution for liquidation or composition after an adjudication of bankruptcy, except under rule 266 of the Bankruptcy Rules, 1870; but that rule only applies to cases where the adjudication is made for the purpose of protecting the property till the creditors have had time to consider the question of liquidation, and in such a case there is an immediate stay of proceedings in the bankruptcy. But here the adjudication is a hostile proceeding and made on sufficient materials: *Ex parte Foster* (1); *Ex parte Walton* (2). The adjudication can only now be got rid of by a formal application to annul it.

McCall, for the debtor:—

With respect to the first objection, the creditors who were present were unanimous, and the assets are very small. The second, the most important objection, is met by the 266th rule, which shews that it was the intention of the Legislature that the creditors should decide whether there should be a bankruptcy or a liquidation. The decision of the Chief Judge in *Ex parte Davis* (3) is directly in point, and has never been questioned. It it not necessary that a formal application should be made to annul the bankruptcy; it can be stayed under sect. 80, sub-s. 10, when it appears that the creditors desire a scheme of liquidation.

(1) Law Rep. 10 Ch. 59. (2) Law Rep. 10 Ch. 215.
(3) 2 Ch. D. 231.

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JAMES, L.J.:—

I am of opinion that the order of the Registrar cannot be sustained. There is a substantial difference between this case and *Ex parte Foster* (1). After an adjudication the assets of the debtor are vested in the trustee. The *status* of the debtor is altered; nothing can be done by him under proceedings in liquidation or composition. Therefore I think the resolution in this case ought not to have been registered. The case of *Ex parte Foster* was decided under very exceptional circumstances. The whole of the bankruptcy proceedings from the first were only provisional, and the adjudication was intended to be ancillary to what might be the result of the meeting of the creditors. It was not a simple case of adjudication. In the present case the debtor was properly adjudicated a bankrupt; there was no ground for suspending the proceedings; the adjudication was made on proper materials, and it can only be got rid of, if at all, by the method pointed out by the Act of Parliament. The order of the Registrar must therefore be reversed.

COTTON, L.J.:—

I am also of opinion that the Registrar ought not to have registered the resolution. It is said that the 266th rule contemplates proceedings in liquidation or composition taking place simultaneously with proceedings in bankruptcy. But the 266th rule treats the adjudication of bankruptcy as ancillary only to the liquidation proceedings. There is to be an adjudication with an immediate stay of proceedings to see if the creditors should determine at their meeting to have a liquidation. It is simply for the purpose of protecting the estate and holding it *in medio* till the result of the creditors' meeting is known; and the rule provides that this ancillary adjudication shall be annulled if the creditors agree upon a liquidation.

It was said that sect. 80, rule 10, of the Act applies to such a case. No, it only gives power in certain circumstances to stay proceedings in the bankruptcy, to see what arrangement can be come to. If that is done, probably the 28th section might be made

(1) Law Rep. 10 Ch. 59.

applicable. By that section power is given to the Court to change the bankruptcy proceedings into liquidation; but that is not done under sections 125 and 126, but as an entirely distinct proceeding. The trustee is to accept a composition or general scheme of arrangement, which is not to be registered under the 125th or 126th section, but, with the sanction of a meeting of the creditors and of the Court, is to be at once carried into effect.

That proceeding in no way resembles what has been done in the present case. I think our decision overrules the decision of the Chief Judge in *Ex parte Davis* (1). But it is in accordance with the opinion of the Lord Justice *Mellish* in *Ex parte Foster* (2). I refer particularly to what the Lord Justice says: "It appears to me that sect. 80, sub-sect. 10, was intended to provide for the case where proceedings in bankruptcy and for liquidation are pending at the same time, and I doubt whether under that section, standing alone, the Registrar could adjudicate the debtor bankrupt, and stay the proceedings under the adjudication. It appears to me that he might either stay the proceedings in bankruptcy, and so reserve the question whether there should be an adjudication, or adjudicate at once, in which case the proceedings for liquidation would come to an end." In that expression of opinion of the Lord Justice I concur. The appeal must be allowed.

LUSH, L.J.:—

I am also of opinion that the Registrar was not justified in registering this resolution. The adjudication was not, as in *Ex parte Foster*, made provisionally to protect the estate till it should appear what the result of the creditors' meeting would be. It was final and intended to be final. There is no part of the Act which permits the creditors to register a resolution for an arrangement with the debtor while the adjudication of bankruptcy is in force. The 28th section empowers the trustee to entertain a scheme of arrangement which may be carried into effect by the Court; but here the trustee opposes the composition. Therefore this resolution is not within that section. I may add that I see no distinction between the present case and *Ex parte Davis*.

(1) 2 Ch. D. 231. (2) Law Rep. 10 Ch. 59, 62.

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JAMES, L.J. :—

I also think that our decision must be considered as overruling *Ex parte Davis* (1).

Solicitors: *S. Whitehead,* agent for *Whateley, Milward, & Co., Birmingham ; Ley & Brocklesby.*

C. A. 1880 C. J. B. *June* 14. C. A. *Nov.* 25; *Dec.* 2.

Ex parte CHALLINOR. *In re* ROGERS.

Bill of Sale—Statement of Consideration—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 8.

A bill of sale is not vitiated under sect. 8 of the *Bills of Sale Act,* 1878, because a part of the sum stated in it as the consideration is retained by the grantee to pay the solicitor's costs of preparing the deed and a further agreed sum for costs previously incurred, and the fee of an auctioneer for valuing the property with a view to the making of the loan.

Decision of *Bacon,* C.J., reversed.

Ex parte Charing Cross Advance and Deposit Bank (2) distinguished.

The "consideration" mentioned by sect. 8 is that which the grantor receives for giving the bill of sale, not necessarily the amount secured by it.

A bill of sale was given to secure, not only a present advance, but also the amount for the time being due to the grantee upon a mortgage including future advances which had been previously given to him by the grantor. The recitals in the bill of sale in stating the amount then due on the mortgage omitted a sum which had been advanced on a bill then current:—

Held, that this misstatement formed no objection under sect. 8 to the validity of the bill of sale.

ON the 24th of October, 1879, *Thomas Rogers,* a licensed victualler at *Hanley,* executed a bill of sale by way of mortgage of his household furniture and other chattels, in favour of *Arthur Challinor,* his solicitor. The deed contained a recital of a mortgage, dated the 22nd of July, 1879, whereby *Rogers* had granted certain hereditaments to *Challinor* in fee for securing the payment to him of the sum of £1000, with interest, and also for securing the payment of any sum or sums of money in which *Rogers* should thereafter become indebted to *Challinor* in respect of advances thereafter to be made by him to or on account of *Rogers,* and also in respect of professional charges for business transacted by *Challinor* as a solicitor acting for or on behalf of *Rogers,* not

(1) 2 Ch. D. 231. (2) *Ante,* p. 35.

exceeding altogether the sum of £2000, with interest. There was a further recital that the sum of £1045, with interest thereon, remained at the date of the execution of the bill of sale due and owing upon the mortgage, and that *Rogers* had requested *Challinor* to lend him the sum of £560, which he had agreed to do upon having the repayment thereof, with interest, and also of all other moneys then or thereafter to become due and owing in respect of the before-recited indenture of mortgage further and better secured in manner thereinafter appearing. And it was witnessed that, in consideration of the sum of £560 that day paid by the grantee to the grantor, and also in consideration of the premises, the grantor did thereby covenant with the grantee that, notwithstanding anything to the contrary contained in the before-recited indenture of mortgage, the grantor would immediately, upon demand thereof in writing signed by the grantee being delivered to him, pay to the grantee the principal, interest, and other moneys for the time being due and owing under or by virtue of the before-recited indenture of mortgage. And it was further witnessed that for the consideration aforesaid the grantor did thereby assign unto the grantee all his household furniture and other chattels, subject to a proviso making the deed void if and when the grantor should pay to the grantee the principal, interest, and other moneys which for the time being should be due and owing upon the security of the bill of sale upon demand in writing by the grantee. And there was a power for the grantee on default in repayment on demand to take possession of the assigned chattels and to sell them. The bill of sale was duly attested in compliance with the provisions of sect. 10 of the *Bills of Sale Act*, 1878. After the attestation clause there was a receipt for £560 signed by *Rogers*. In fact, only £500 was handed by *Challinor* to *Rogers* on the execution of the deed, £40 being retained by *Challinor* in payment of his costs of preparing the deed and some other costs which *Rogers* owed him for other business previously transacted, but for which he had not delivered a bill, and £20 being paid to an auctioneer named *O'Keefe* who had valued the chattels with a view to the making of the loan. The auctioneer signed a receipt for the £20 as being paid to him by *Rogers* through *Challinor*.

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At the time of the execution of the bill of sale, *Rogers* (in addition to the £1045 mentioned in it), owed *Challinor* a further sum of £321 in respect of advances, which was secured by a bill of exchange. The bill of exchange had not become due.

On the 19th of January, 1880, *Rogers* filed a liquidation petition. The trustee in the liquidation applied to the *Hanley* County Court for an order declaring the bill of sale void as against him, on the ground (*inter alia*) that the consideration had not been set forth in it in compliance with sect. 8 of the *Bills of Sale Act*, 1878. The Deputy Judge refused the application. The trustee appealed to the Chief Judge. The appeal was heard on the 14th of June, 1880.

E. Cooper Willis, for the Appellant:—

The question is whether, having regard to the fact that £500 only was actually paid to *Rogers*, "the consideration for which such bill of sale was given" has been set forth so as to comply with the requirements of the *Bills of Sale Act*, 1878 (41 & 42 Vict. c. 31), s. 8.

[He was stopped.]

Winslow, Q.C., and *Finlay Knight*, for the Respondent, *Challinor*:—

The consideration for the bill of sale has been sufficiently stated. The Act only requires that to be stated which independently of the Act would have been properly stated as the consideration between the grantor and the grantee; it does not require a collateral bargain between the grantor and the grantee as to the application of the consideration to be stated: *Ex parte National Mercantile Bank* (1). Provided that the money has been truly advanced, the mere fact that part of it went to other persons with the grantor's assent does not render the statement of the consideration inaccurate: *Hamlyn* v. *Betteley* (2). It is not denied that the grantor authorized *Challinor* to deduct the £60 and appropriate it in payment of his own and *O'Keefe's* professional charges.

(1) 15 Ch. D. 42. (2) 5 C. P. D. 327.

BACON, C.J.:—

In this case I have to deal only with an Act of Parliament, which in very plain terms says that unless the consideration for which the bill of sale was given be stated—which, as has been observed, can only mean that it must be truly stated—the deed shall be void as against the trustee in bankruptcy of the grantor. In the case of *Ex parte National Mercantile Bank* (1), of which I have a very clear recollection, the learned Judges in the Court of Appeal were satisfied that the Act of Parliament had been strictly complied with, and that the moneys, stated in the deed to be the consideration, did pass from the lender, the mortgagee, to the debtor, the borrower. No mention was made that it was a mere contrivance to prefer the bank to the extent of £500 to all the other creditors of the borrower, who was unquestionably unable at the time to pay his debts with his own moneys. That decision I am bound to follow, and if the case before me contained any evidence that the £560 was paid, as in the case of the *National Mercantile Bank*, of course I should at once say that there was no question about this case. *Hamlyn* v. *Betteley* (2) is equally clear. The consideration was there truly stated. The whole sum had been paid to the borrower, though it was divided into several cheques, some of which went by his direction to persons to whom he was indebted; the cheques being drawn for him by the lender of the money. Here the facts appear to be that at the time this transaction took place, the borrower owed £20 to one *O'Keefe*, an auctioneer, who had made a valuation, and a sum of money to Mr. *Challinor*, the lender, for costs estimated at £40. No bill of costs, however, had, as I understand, been delivered, but it is proved that a sum of £40 was the estimated amount due from the borrower to the lender at that time, and I have no reason to doubt that it was justly due. The deed states that *Rogers* being already a mortgagor and wanting more money, it has been agreed that £560 shall be presently advanced to him by *Challinor*. The consideration stated in the deed is "in consideration of £560 this day paid" by the lender to the borrower. The receipt upon the deed carries out the same notion, and purports to be a receipt for £560, "being the consideration hereinbefore expressed to be paid by him to me."

(1) 15 Ch. D. 42. (2) 5 C. P. D. 327.

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As to £500, that was the only sum that was paid, the other sums amounting to £60 chargeable for costs and the satisfaction of a debt having been deducted. It is totally different from the statement in the bill of sale that £560 in money was paid by the lender to the borrower. In my opinion the deed is inoperative under the statute as against the trustee in the liquidation.

Appeal allowed with costs.

C. A.

From this decision the grantee appealed. The appeal was heard on the 25th of November and the 2nd of December, 1880.

Winslow, Q.C., and *Finlay Knight*, for the Appellant:—

The consideration is sufficiently set forth in the bill of sale: *Ex parte Probyn* (1); *Ex parte National Mercantile Bank* (2). In the latter case it was held that the costs of preparing the bill of sale might properly be retained by the grantee out of the expressed consideration. And it was also held that payment of a debt due by the grantor was equivalent to payment to him. This applies to the payments in the present case of the costs already due to the grantee, and the charges of the auctioneer for the valuation.

E. Cooper Willis, for the trustee:—

The sum said to be due to *Challinor* for prior costs was already covered by the prior mortgage. The fact that more was due on the former mortgage than is stated in the recital is material, for persons might trust the grantor on the faith of that statement. It might be stated that £10 was due when £1000 was really due.

[JAMES, L.J.:—That would be a distinct fraud, and perhaps the grantee would be bound by the recital, and could not claim more than the sum stated in it.]

The consideration may be untruly stated by making it too little, just as well as by making it too much. The public are equally deceived.

[JAMES, L.J.:—The consideration is that which passes to the

(1) 24 Sol. J. 344. (2) 15 Ch. D. 42.

grantee at the time when the deed is executed; not necessarily the sum which is secured by the deed.]

In *Hamlyn* v. *Betteley* (1), *Grove*, J., said (2), "If the misstatement of the transaction is so mixed up with the consideration as to give an untrue impression of what the consideration really was, that might be an improper setting forth of the consideration." That applies to the present case. The expenses of the preparation of the bill of sale are a debt arising out of the transaction of loan, and could not therefore form part of the consideration: *Ex parte Charing Cross Advance and Deposit Bank* (3).

Winslow, in reply:—

The transaction was perfectly *bonâ fide*. The statement that only £1045 was then due on the prior mortgage was true, for the bill of exchange for £321 had not then matured. The consideration for a deed is that which the parties agree upon as the consideration; a man is not bound to make the whole of a past debt the consideration for a security given to him. The omission to state something which is due does not make that which is stated untrue. The case is governed by *Ex parte National Mercantile Bank* (4).

JAMES, L.J.:—

I am of opinion that the decision of the County Court Judge ought to be affirmed, and that of the Chief Judge reversed. The Act requires that every bill of sale shall set forth the consideration for which it was given, which must mean that the consideration is to be truly stated, honestly stated, without any concealment or fraud. The word "consideration" is a legal term, it means that which in point of law is the consideration for the giving of the instrument. I am of opinion that in the present case the true legal consideration for the deed was £560. Whether the whole of the mortgage-money is actually paid by the lender into the hands of the borrower, or whether part of it is with his privity or by his direction employed in the payment of a debt due

(1) 5 C. P. D. 327.
(2) Ibid. 330.
(3) *Ante*, p. 35.
(4) 15 Ch. D. 42.

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by him, it is equally in a legal sense paid to him. It may be tested in this way. Suppose there was no instrument in writing at all except a receipt by the borrower for the money; beyond all question the person who had advanced the £500 to him, and had retained £60 for the purpose of making other payments for him, would have been liable to account for the £60 as the borrower's money in his hands. The question is whether the transaction was a sham. That which was in the contemplation of the Legislature was the very thing which occurred in *Ex parte Charing Cross Advance and Deposit Bank* (1), where a man says that he has advanced £100 when he has in fact kept back £10 for interest or discount. Or suppose part of the expressed consideration was to be taken in *Birmingham* jewellery or in mousetraps, there would not be a true statement of the consideration. But when a man borrows money he generally does so for the purpose of paying his debts, at any rate he ought to employ it in paying them, and, if by his direction the money stated as the consideration is applied by the lender in the honest discharge of the borrower's debts, there is no reason for saying that that is not a payment of the money to him. That was the principle of our decision in *Ex parte National Mercantile Bank* (2), and in that case, besides the promissory notes of the borrower which were taken up, there were deducted some charges for the preparation of the security. It appears to me quite right to deduct the costs of preparing the bill of sale, and the auctioneer's charges for valuing the property, for that is what happens upon every mortgage transaction. The amount advanced is always considered to be that which is mentioned in the mortgage deed, and out of that sum the solicitor who prepares the deed, who is always the solicitor of the mortgagee, deducts his own costs of preparing the deed, and the fee of any person who has been employed to value the mortgaged property with a view to the making of the advance. And it does not seem to me that the money was the less paid to the borrower because part of it was with his consent applied in payment of a debt for costs to his solicitor, which was not indeed strictly payable, because a bill of costs had not been delivered, but which was really owing to the solicitor. It was a payment which

(1) *Ante*, p. 35. (2) 15 Ch. D. 42.

the borrower ought to have made out of the borrowed money. It appears to me that the legal consideration given for the execution of the deed was £560, and, there being no fraud, the transaction cannot be impeached. I do not think that anything turns upon the recitals of the prior mortgage and the amount due on it. The Appellant was not cross-examined about them. And it appears to me that the Act does not require anything to be stated which relates to a prior transaction.

COTTON, L.J.:—

The only question is as to the operation of sect. 8 of the Act. I think the matter is not free from doubt, but I cannot agree with the Chief Judge. I think that the consideration is truly stated in the deed. There is nothing like fraud in the present case, nothing like an attempt by the lender to load the transaction, and to obtain from it a larger benefit than that which really appears on the face of the deed. There is no suggestion that the £40 was not fairly treated by the parties at the time as due by the grantor to the grantee in respect of costs. There being then nothing like fraud or making up of the sum stated as the consideration, what is the objection to the deed? The first objection is that £560 is stated as the consideration, whereas only £500 was paid to the grantor. I am of opinion that the £60 must be treated as having been paid to or for him. The payment of £20 to the valuer was made for the grantor, and I think it may be fairly treated as a payment to him, just as if it had been actually paid to him and then applied by him in paying the valuer. The £40 was not a payment of interest or bonus to the person who was making the advance, but it was paid as to part of it in respect of costs which were due to him by the grantor, and as to the rest in respect of the costs of preparing the deed, the lender of the money happening to be also the borrower's solicitor. There is no more difficulty in holding that the £60 was paid to the grantor than there would have been if the money had been actually handed to him, and then applied by him in making the payments. Possibly there may be a little more difficulty as to the costs of preparing the bill of sale than as to the rest of the £60. But that has been already dealt with by this Court in *Ex parte*

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National Mercantile Bank (1), where it was held that the expenses of preparing a bill of sale might properly be retained out of the consideration stated in it. There was nothing like giving any improper advantage to the mortgagee, and I am of opinion that the consideration is truly stated in the deed. The other objection arises out of the recital of the prior mortgage and the amount due upon it, a larger amount being in fact due than that which is mentioned in the recital. It is said that the amount due on the mortgage is part of the consideration for the bill of sale. No doubt the bill of sale was given to secure the amount which was due upon the mortgage as well as the £560. But, in my opinion, if there was an error in stating the amount due, that is not sufficient to avoid the bill of sale under the Act. The consideration for the bill of sale is the sum which was then advanced to the grantor; the amount which the bill of sale is given to secure is not necessarily the consideration which is intended by the Act. In my opinion there is no objection to the validity of this bill of sale.

LUSH, L.J.:—

The Act requires that the bill of sale shall state the consideration for which it is given, by which I understand that which the grantor receives for giving the bill of sale. In the present case the sum stated as the consideration is £560. In fact, the grantor owed the grantee a sum of £40 for costs, and a further debt of £20 had been incurred for a valuation of the property. Everyone knows that the costs of valuing property for the purposes of a mortgage, and the costs of preparing the mortgage deed, are always borne by the mortgagor and must be paid by him. The remainder of the £40 was for costs due to the grantee in relation to other matters. Only £500 in money actually passed from the grantee to the grantor. But suppose that the grantee, before he finally agreed to lend the money to the grantor, had said to him, You owe me £35 for costs and there will be £5 for the costs of preparing the bill of sale, and you must undertake to pay out of the advance those costs, and also the costs of making a valuation of the property, and the grantor had paid those sums out of

(1) 15 Ch. D. 42.

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the advance after it had been made to him, could it then have been said that £560 was not the true consideration for the bill of sale? But that would have been in substance exactly the same thing as what actually took place here. The passing and repassing of the money from hand to hand is a mere form. The grantor got for the bill of sale £500 and the payment of debts amounting to £60, and surely £560 was the true consideration for the deed.

As to the other objection, that the recital of the amount due on the prior mortgage is incorrect, the deed contains, first, simply a covenant that, in consideration of the £560 paid to the grantor, and also in consideration of the premises, the grantor will on demand pay to the grantee the principal, interest, and other moneys for the time being due by virtue of the mortgage. I cannot help thinking that the word "consideration" is there used in two different senses. Then in the operative part of the deed the grantor, "for the consideration aforesaid" (not the considerations), assigns his furniture and other chattels as security. I think that the statement of the consideration accurately conforms to the requirements of the Act, and that the case is distinguishable from *Ex parte Charing Cross Advance and Deposit Bank* (1). In that case something was kept back by the grantee out of the nominal consideration as interest on the advance, though nothing could be then due for interest. In the present case there is nothing like fraud, and for the reasons which have been given by my learned colleagues, though my mind has fluctuated during the argument, I am now clearly of opinion that the provisions of the Act have been complied with, and that the consideration has been truly stated. The grantor received the £560 either in money or in that which was equivalent to money.

Appeal allowed.

Solicitor for Appellant: *J. Peace*, agent for *J. B. Ayre, Hanley.*

Solicitors for Trustee: *Pitman & Lane*, agents for *E. A. Ashmall, Hanley.*

(1) *Ante*, p. 35.

C. A.
1881
Jan. 26.

In re CAVANDER'S TRUSTS.

Practice—Notice by Respondent to ask for Variation—Rules of Court, 1875, *Order* LVIII., *r.* 6.

A respondent who seeks to have an order varied on a point in which the appellant has no interest, cannot proceed by notice under Rules of Court, 1875, Order LVIII., rule 6, but must give a notice of appeal.

A FUND of £1935 13*s.* 10*d.* consols being in Court under the *Trustee Relief Act*, "In the matter of the trusts of the sum of £6000 bequeathed by the will of *William Cavander* in favour of *Eliza Loe* and her issue—the account of *Eliza Mary Loe* and those claiming under her," petitions were presented by *Eliza Mary Loe* and by *F. W. Macan*, an incumbrancer, and on the 24th of April, 1880, an order was made on the two petitions that the fund should be sold, and that out of the proceeds certain sums, amounting together to £1414 19*s.* 2*d.*, should be paid to *Macan*, *Buckler*, and three other persons named in the first schedule to the order, and certain amounts of costs paid to the solicitors of the persons mentioned in the second schedule, and the residue to *Eliza Mary Loe*.

Mr. *Buckler* acted as the solicitor of *E. M. Loe* in the presentation of her above-mentioned petition. *E. M. Loe* afterwards moved to discharge the order on the ground that the petition was presented without proper authority, and on the 30th of July, 1880, Vice-Chancellor *Bacon* made an order discharging the order of the 24th of April, 1880, directing *Buckler* to pay the costs as between solicitor and client of that application, and of *E. M. Loe's* petition and the order made upon it, and making a stop order in favour of the incumbrancers other than *Buckler* named in the first schedule to the order of the 24th of April.

Within twenty-one days from the completion of the last-mentioned order, *Finnis & Wylie*, who had purchased *Macan's* interest, gave notice of appeal to vary that order by directing the amount claimed by *Macan* to be raised and paid to them. After this, on the 15th of December, 1880, *Buckler* served notice of appeal from the order of

the 30th of July, 1880, asking that the order might be discharged in so far as it discharged the order of the 24th of April and directed *Buckler* to pay costs. *Finnis & Wylie* thereupon, on the 16th of December, withdrew their notice of appeal by the following letter sent to all parties:—

"As Mr. *Buckler* has now served notice of appeal from the order of the 30th of July last, an appeal is no longer necessary, and we beg to inform you that we withdraw the notice of appeal motion accordingly. We intend, however, on the hearing of Mr. *Buckler's* appeal, to contend that the Vice-Chancellor's order should be varied in accordance with the terms of our notice of motion."

Davey, Q.C., and *C. H. Turner*, for *Buckler*, in support of the appeal.

Sir *H. Jackson*, Q.C., and *Colt*, for *E. M. Loe*.

Horton Smith, Q.C., and *Dauney*, for *Finnis & Wylie*.

Northmore Lawrence, for other parties.

Upon the case being called on, it was agreed between *E. M. Loe* and the Appellant that the appeal should be withdrawn, and an order taken dismissing it without costs.

Horton Smith then claimed to be heard in support of the contention that the order under appeal should be varied in the manner mentioned in the letter of the 16th of December.

JESSEL, M.R.:—

I wish to say a few words as to the construction of Order LVIII., rule 6. That rule provides that "it shall not under any circumstances be necessary for a respondent to give notice of motion by way of cross appeal, but if a respondent intends upon the hearing of the appeal to contend that the decision of the Court below should be varied, he shall within the time specified in the next rule, or such time as may be prescribed by special order, give notice of such intention to any parties who may be affected by

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such contention." The terms of the latter part of this rule are very wide, but looking at the former part, it is evident that it was only intended to make the notice a substitute for a cross appeal, and an appeal on a point which does not affect the original appellant cannot be a cross appeal. The notice may affect other parties also, and if so it must be served upon them, but it cannot have been intended to enable a respondent to bring forward in this way a case with which the appellant has nothing to do (1). If he has a case of that kind, he must give a notice of appeal. Moreover, the rule provides that notice shall be given to the appellant, but why should this be required unless the rule is confined to cases in which the appellant is affected. I am reported to have said, and probably did say, that when a notice of this kind has been given the appeal cannot be withdrawn; but that only means that, when a notice has been given under the rule, the appellant cannot by withdrawing his appeal prevent the party giving the notice from having his point argued.

BRETT and COTTON, L.JJ., concurred.

An order was made dismissing the appeal without costs, and leave was given to *Finnis & Wylie* to give notice of appeal within a week.

Solicitors: *T. W. Buckler; W. H. Orchard; E. S. & G. Gibney; Finnis & Wylie.*

(1) See *Ralph* v. *Carrick*, 11 Ch. D. 873.

CHARLTON *v.* CHARLTON.

C. A. 1881 Jan. 26.

[1877 C. 33.]

Practice—Costs of Abandoned Appeal.

On the 20th of December, 1880, *C.* gave notice of appeal, but did not set it down. On the 11th of January he sent a letter withdrawing his notice of appeal. On the next day the solicitor for the Respondents wrote to *C.* saying that he had delivered briefs, and that unless *C.* would undertake to pay the Respondents' costs of the appeal the usual proceedings would be taken to enforce payment of them. *C.* did not answer this letter. The Respondents then moved that the appeal might be dismissed, and that *C.* might be ordered to pay the costs of the appeal and of this application, and an order was made accordingly.

ON the 20th of December, 1880, *Chatterton* gave notice of appeal for the 28th of December to discharge an order made on the 4th of November, 1880, but never set down the appeal. The Respondents prepared and delivered briefs. On the 11th of January *Chatterton* sent a letter withdrawing his notice of appeal. On the 12th the solicitor of the Respondents wrote to *Chatterton* acknowledging the receipt of the notice, and stating that as he had prepared and delivered briefs, and had prepared a notice to dismiss the appeal for want of prosecution, he must ask *Chatterton* to undertake to pay the Respondents' costs of the appeal, otherwise he should take the usual proceedings to enforce payment of them.

No answer having been received to this notice, the Respondents on the 19th of January gave notice of motion that the appeal might be dismissed for want of prosecution, and that *Chatterton* might be ordered to pay the costs of the appeal and of that application.

Higgins, Q.C., and *Seward Brice*, for the motion, referred to *Webb* v. *Mansel* (1); *In re Oakwell Collieries* (2); *Griffin* v. *Allen* (3).

Glasse, Q.C., and *Terrell*, for *Chatterton*.

(1) 2 Q. B. D. 117. (2) 7 Ch. D. 706.
(3) 11 Ch. D. 913.

C. A. 1881 CHARLTON v. CHARLTON.

THE COURT (*Jessel*, M.R., and *Brett* and *Cotton*, L.JJ.) made an order dismissing the appeal with costs, and giving the applicants their costs of the present application, but stated that they should give no opinion whether the costs of the briefs delivered on the appeal ought to be allowed, that being a point to be dealt with by the Taxing Master.

Solicitors: *W. Howland Jackson; Chatterton.*

C. A. 1880 C. J. B. *May* 10. C. A. *Nov.* 25.

In re THRELFALL.
Ex parte QUEEN'S BENEFIT BUILDING SOCIETY.

Landlord and Tenant—Tenancy from Year to Year or at Will—Attornment Clause—Distress—Bankruptcy Act, 1869, *s.* 34.

A mortgage deed contained an attornment clause whereby *A.* (the mortgagor) attorned and became tenant from year to year to *B.* (the mortgagee) for and in respect of the mortgaged premises, at the yearly rent of £800, to be paid by equal quarterly payments. And it was thereby agreed that it should be lawful for *B.*, at any time after three months from the date of the mortgage, without giving previous notice of his intention so to do, to enter upon and take possession of the premises whereof *A.* had attorned tenant, and to determine the tenancy created by the aforesaid attornment. *A.* filed a liquidation petition, and on the same day a receiver was appointed, who entered into possession of *A.*'s estate and effects.

Notice of the petition and of the appointment of a receiver was sent to *B.*, who two days later, by virtue of the attornment clause, distrained upon the goods and chattels on the mortgaged premises for a half-year's rent then due:—

Held (affirming the decision of *Bacon*, C.J.), that a tenancy from year to year and not a tenancy at will was created by the attornment clause, and that *B.* was entitled, under the *Bankruptcy Act*, 1869, s. 34, to distrain for the rent due to him from *A.* at the time of filing the liquidation petition.

Morton v. *Woods* (1) explained.

18 CLD 132
21 CLD. 447

APPEAL from an order of the *Lancashire* County Court restraining the *Queen's Benefit Building Society* from proceeding with a distress levied on the 19th of May, 1879, on certain goods, &c., part of the estate of *William G. Threlfall*, a liquidating debtor, and ordering the society to deliver to the trustee in liqui-

(1) Law Rep. 4 Q. B. 293.

dation the goods which had come to their possession, custody, or power under or by virtue of the distress levied by them in pursuance of an attornment clause contained in a mortgage deed of the 1st of June, 1871.

By indenture of mortgage of the 1st of June, 1871, *James Threlfall* (since deceased) and *William G. Threlfall* mortgaged certain land, with a cotton mill and buildings and other property and machinery, to the *Queen's Benefit Building Society*, their heirs and assigns, to secure the repayment of an advance of £16,000 and interest. In the mortgage deed was contained an attornment clause whereby *J.* and *William G. Threlfall* "did thereby attorn and become tenants from year to year to the said trustees, their heirs and assigns, for and in respect of the mill and appurtenances and certain plots of land then held and occupied therewith by *J.* and *William G. Threlfall* at the yearly rent of £800, clear of all deductions, to be paid by equal quarterly payments, the first quarterly payment on the day of the execution of the mortgage. And it was thereby agreed that it should be lawful for the trustees, their heirs and assigns, at any time after the 1st of September, 1871, without giving previous notice of their intention so to do, to enter upon and take possession of the mill, buildings, and premises whereof *J.* and *William G. Threlfall* had attorned tenants as aforesaid, and to determine the tenancy created by the aforesaid attornment."

James Threlfall died in December, 1871, having by his will devised all his real and personal estate to *William G. Threlfall,* who was appointed his executor.

In May, 1874, the mill and premises were mortgaged by *William G. Threlfall* to Messrs. *Schwabe* and *Crankshaw,* subject to the mortgage of June, 1871; and a further charge to the *Building Society* was made on the 6th of June, 1876, it being agreed that this charge (of £4000) should have priority over the mortgage to *Schwabe* and *Crankshaw.*

On the 17th of May, 1879, *William G. Threlfall* filed a liquidation petition, and on the same day *John Blakey* was appointed receiver and manager, and entered into possession of the debtor's estate and effects.

Notice of the liquidation petition and of the appointment of a

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receiver was on the 17th of May sent to the trustees of the *Building Society*, and on the 19th of May, under and by virtue of the attornment clause, the trustees distrained upon the goods and chattels in the mill for a half-year's rent.

At the first general meeting of creditors held on the 30th of June, 1879, *John Blakey* was appointed trustee under the liquidation. Upon the application of *Blakey* to the County Court to restrain proceedings under the distress, and to obtain a delivery up of the property and effects received thereunder, the County Court Judge, being of opinion that the tenancy under the attornment clause was a mere tenancy at will, and as such determined by the presentation of the liquidation petition, held that the distress of the 19th of May, 1879 (after notice of the petition), was not protected by the *Bankruptcy Act*, 1869, s. 34, which applied only to the case of a landlord who possessed a legal right to distrain; and being unauthorized and unlawful could not prevail against the title of the liquidation trustee.

From this decision the trustees of the *Building Society* appealed to the Chief Judge. The appeal was heard on the 10th of May, 1880.

Winslow, Q.C., and *S. Taylor*, in support of the appeal:—

The trustees of the society, though not landlords in the ordinary sense, were by virtue of the attornment clause in the deed of June, 1871, persons to whom rent in respect of a tenancy was due from the mortgagors within the meaning of the *Bankruptcy Act*, 1869, s. 34, and they have the same right of distress as any other landlord: *Ex parte Hill* (1); *In re Stockton Iron Furnace Company* (2); *Ex parte Auckland Building Society* (before C. J. B. Feb. 10, 1878); *Jolly* v. *Arbuthnot* (3); *Morton* v. *Woods* (4). Assuming that a tenancy at will only was created by the attornment clause, such tenancy cannot be determined by the tenant to the landlord's detriment without notice to him—in this case without paying off the mortgage debt: *Title* v. *Grevett* (5); *Pinhorn* v. *Souster* (6); *Carpenter* v. *Colins* (7); *Co. Litt.* (8); *Vin.*

(1) 6 Ch. D. 63, 69.
(2) 10 Ch. D. 335.
(3) 4 De G. & J. 224.
(4) Law Rep. 3 Q. B. 658; Ibid. 4 Q. B. 293.
(5) 2 Ld. Raym. 1008.
(6) 8 Ex. 763, 772.
(7) Yelv. 73.
(8) 55, a, 19th Ed. [1832].

Abr. (1). Even if the tenancy was determined by the act of bankruptcy, the distress, being made within six months after such determination, is valid under 8 Anne, c. 14, ss. 6, 7. But we say that a tenancy from year to year, and not at will, was created, with the usual right of distress, and the relation of landlord and tenant having been created by agreement between the parties, either party is estopped from denying the tenancy: *Morton* v. *Woods* (2); and the receiver is in no better position for this purpose than the liquidating debtor, in whom the property remains vested until the liquidation is perfected by the appointment of a trustee: *Ex parte Postmaster-General* (3).

De Gex, Q.C., and *G. B. Finch*, for the Respondent:—

The mortgagees in this case were not persons entitled under the *Bankruptcy Act*, 1869, s. 34, to distrain upon the goods and effects of the bankrupt for rent due to them from the bankrupt. If any tenancy was created by the attornment clause, it was a tenancy at will, and not from year to year: *Morton* v. *Woods*. The provision in the deed that the mortgagees should be entitled at any time, without previous notice, to enter and put an end to the tenancy, is wholly repugnant to the previous words purporting to create a tenancy for years, and avoids the deed. At all events, the primary intention of the deed, that the tenancy was one at will only, cannot be controlled by the preceding words, so as to add any more certainty to the continuance of the term: *Bacon*, Abr., "Leases and Terms for Years" (4), citing *Bro.* Abr., tit. "Lease" (5), and must prevail. If a tenancy at will, it is at the will of both parties: *Co. Litt.* (6), without any obligation on the part of either lessor or lessee to continue it for any determinate term: *Co. Litt.* (7); and may be determined by either party at any time: *Platt* on Leases (8); *Watkins'* Conv. (9). If not determined by the second mortgage of 1874, the tenancy at will was put an end to by the liquidation petition of the tenant as

(1) Vol. x. pp. 405–407.
(2) Law Rep. 3 Q. B. 658; Ibid. 4 Q. B. 293.
(3) 10 Ch. D. 595.
(4) L. 3, p. 836.
(5) Page 13.
(6) Ibid. 55, a.
(7) Ibid. 270, b.
(8) Vol. i. p. 654.
(9) Page 2.

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soon as the petition came to the knowledge of the *Building Society: Doe* v. *Thomas* (1). When the distress was made the petition had come to the knowledge of the *Building Society*, and as the title of the trustee relates back to the presentation of the petition, the possession was that of the trustee, and not of the debtor. The *Building Society*, therefore, had no right to distrain, either at Common Law or under 8 Anne, c. 14, s. 7, as the goods were not in the possession of the debtor when the distress was made; and not having any right to distrain, the distress was not authorized by the *Bankruptcy Act*, 1869, s. 34, and was unlawful and irregular. In *In re Stockton Iron Furnace Company* (2) the act of bankruptcy did not take place until after the distress. All that *Ex parte Postmaster-General* (3) decided was that the relation back of the title of the trustee in liquidation did not affect the rights of the Crown under an extent issued between the filing of the petition and the appointment of a trustee.

BACON, C.J.:—

The case seems to me to be free from doubt of all kind. The rights of a landlord against a tenant at will have been established for centuries. The note in *Viner's* Abridgment, which is an elaborate summary of the law on this subject, makes it clear and almost common-place. A man between whom and the tenant in possession the relation of landlord and tenant has been created has a right to distrain under the statute of *Anne*, and had before the statute of *Anne* was passed. That is the only question I have to consider here, the *Bankruptcy Act* being clear and plain that any man, being a landlord, or other man having a right to distrain, may distrain for a year's rent.

On the point of law which I have to decide, I find that, in several cases, of which *Morton* v. *Woods* (4) is only one, all that the Court has to inquire about and ultimately to decide is, whether the relation of landlord and tenant subsists, and if it does, the statute does the rest and clothes the landlord with the right to distrain. If he has distrained for more than is due to

(1) 6 Ex. 854.
(2) 10 Ch. D. 335.
(3) 10 Ch. D. 595.
(4) Law Rep. 3 Q. B. 658; Ibid. 4 Q. B. 293.

him, that must be settled in some other way; but that such is the plain law, there can, I think, be no doubt. It is so laid down in *Jolly* v. *Arbuthnot* (1). There, there had been an infirmity in the deed, and an argument which found favour at the Rolls was that there was no such legal estate as authorized the distress, that the receiver had no legal estate, and so on. What the Court did was to inquire whether the relation of landlord and tenant subsisted between these parties. There may be a thousand other questions, but it does not matter what they are. If you find that a man has become bankrupt, that he is represented by a trustee who can have no other rights in this case than the bankrupt himself could have had if he had not become bankrupt, and distress is levied for the rent which he owed to the landlord, is it necessary to have any other facts to deal with? The statute is plain. The trustee can claim no right which the bankrupt could not have claimed. Suppose there had been no bankruptcy, and distress levied, and the tenant replevied, then the law is clear. He has attorned tenant, he has become tenant, whether at will or from year to year does not in the slightest degree signify for the purpose of administration in this Court of Bankruptcy, and the landlord's right to distrain, in my opinion, can on no ground be disputed. It is not necessary to go into that long list of cases beginning with *Pinhorn* v. *Souster* (2). The most recent case in which it has been discussed is *Morton* v. *Woods* (3). In *Morton* v. *Woods* the decision is perfectly plain. There it had been what purported to be a lease for ten years, which was invalid because it was not properly stamped, or for some other reason, and the Court said the intention of the parties should prevail; if they meant to create the relation of landlord and tenant, what they intended must be carried into effect by the law. That is the decision of *Morton* v. *Woods*. The tenant cannot alienate without notice; he cannot, by any act he does, deprive his landlord of that right which he has conceded to him by their contract, and whether it is a mortgage deed or anything else does not signify.

Then it has been argued that there is a repugnancy in the deed, by force of which I am to defeat the mortgagee's rights, because

(1) 4 De G. & J. 224. (2) 8 Ex. 763.
(3) Law Rep. 8 Q. B. 658; Ibid. 4 Q. B. 293.

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he has stipulated that there shall be an attornment as tenant from year to year, and also has reserved to himself power to enter and take possession, and that the deed is so far repugnant as that it has become void. To say, when the mortgagee is exercising one of his powers, that he has another, or that he might claim another which he does not claim, and to say that vitiates the deed and makes it repugnant and puts an end to the solemn contract between two parties, is an argument which I find it impossible to follow. Founding myself solely on the words of the statute, on the clear evidence of what was the intention of the parties in this deed, on the impossibility of the mortgagor under these circumstances doing anything to derogate from or prejudice the right of the mortgagee, I think the distress was perfectly valid and right, and that under the statute and under the deed, the *Building Society*, who are the landlords in this case, were entitled to levy the distress which they did, and are entitled to be paid the rent in preference. The receiver's possession was not in their way in the slightest degree. If that could form any objection it is merely a technical one. If after a receiver had been appointed the landlord distrained, is that a nullity? The Court might say, You shall not carry away and sell, but it would also say, "We will respect your rights; your rights as landlord distraining shall be regarded, they shall be taken care of; but as we have taken it into our hands as *in custodiam legis*, you shall not remove anything." That is all. It is only matter of mere practical convenience; it does not touch any right in the world. In my opinion, therefore, the order which has been made declaring that the distress was invalid is one which cannot be sustained, and must be discharged.

C. A. From this judgment the trustee in the liquidation appealed. The appeal was heard on the 25th of November, 1880.

Joshua Williams, Q.C., and *Finch* (*De Gex*, Q.C., with them), for the Appellant:—

The tenancy created by the attornment clause, being determinable at the will of the mortgagee, was not a yearly tenancy, but a tenancy at will. If one party had the power to determine the tenancy at will the other necessarily had the same power:

Co. Litt. (1); *Doe* v. *Thomas* (2); *Morton* v. *Woods* (3), where some of the Judges in the Queen's Bench, and *Kelly*, C.B., in the Exchequer Chamber, expressed their opinion that the effect of a similar clause was to shew an intention to create a tenancy at will.

Winslow, Q.C., and *S. Taylor*, for the trustees of the *Building Society*, were not called on.

JAMES, L.J.:—

We are asked in this case, not to construe a deed, but to contradict it, for the purpose of entirely destroying the intention of the parties to it. The mortgagor was left in possession of the property, and was thereby enabled to give a power of distress to the mortgagee. The attornment clause was in the common form, and was intended to create the relation of landlord and tenant between the parties. The mortgagor, by the express terms of the deed, was to be tenant from year to year at the yearly rent specified. This tenancy was determinable at the will of the mortgagee; but this power the mortgagee would equally have had if the premises were in the possession of a third party, and it is the usual power given to a mortgagee to enable him to take possession. We are asked to say that in spite of the express terms of the deed this was not a yearly tenancy but a tenancy at will, on account of some expressions of some of the Judges in *Morton* v. *Woods*. But in that case there was no actual demise, but for the purpose of giving effect to the manifest intention of the parties it was held that a tenancy at will had been created. The appeal must be dismissed.

COTTON, L.J.:—

We are asked to say that the tenancy, stated in this attornment clause to be a yearly tenancy, was in fact a tenancy at will. The ground on which we are asked to say this, is, that power was given to the mortgagee to determine the relation of landlord and tenant. But I know of no law or principle to prevent two persons agreeing that a yearly tenancy may be determined on whatever

(1) 55, a. (2) 6 Ex. 854.
(3) Law Rep. 3 Q. B. 658; Ibid. 4 Q. B. 293.

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notice they like. There is freedom of contract in this respect. In one sense, indeed, there is a tenancy at the will of the landlord; that is, he is enabled to put an end to a yearly tenancy at a very short notice. All that the passage cited from *Coke* means, is, that if there is a demise with no term fixed between the parties except the will of the lessor, then it is implied by law to be also at the will of the tenant.

Then it is argued that the point was concluded by the authority of *Morton* v. *Woods* (1), because some of the Judges there said that the tenancy in that case was not a demise for ten years, but that it was intended to be a tenancy at will. One can hardly think that they meant a tenancy at will with all its consequences. At all events, that opinion was founded on the construction of that particular deed and cannot bind the construction of another deed in different words. In this case I think there was no tenancy at will, but a yearly tenancy.

LUSH, L.J.:—

Although in *Morton* v. *Woods* the expression "tenancy at will" was used by some of the Judges while professing to describe the relation between the parties, yet it must not be taken as intended to be an exact legal definition of it, particularly when we consider the facts and arguments before them. In all cases the words of the judgment must be considered with reference to the arguments adduced. I am rather glad to see that I did not myself describe the tenancy as a tenancy at will. But the argument in that case was that the attornment was for ten years, and if so, void because not made by deed; and therefore the Judges said that it was a tenancy at will, meaning a tenancy for an indefinite term not to exceed ten years, determinable at the will of the landlord. That is precisely like this case, a yearly tenancy with an express proviso for the determination of that tenancy at any time by will of the lessor.

Solicitors: *Pritchard, Englefield, & Co.*, agents for *Grundy, Kershaw, & Co., Manchester; Gregory, Rowcliffes, & Rawle*, agents for *Charnley & Finch, Preston.*

(1) Law Rep. 3 Q. B. 658; Ibid. 4 Q. B. 293.

Applied. *Re* A DEBTOR (No. 452 of 1948). [1949] 1 All E.R. 652.

Ex parte YEATMAN. *In re* YEATMAN.

C. A. 1880 Dec. 2.

Bankruptcy Petition—Disputed Debt—Stay of Proceedings pending Trial of Validity of Debt—Discretion of Registrar—Waiver of Irregularity—Bankruptcy Rules, 1870, *r.* 43.

When the proceedings on a bankruptcy petition have been stayed for the trial of the question of the validity of the petitioning creditor's debt, and the validity of the debt has been established by the judgment of a Court of first instance, the Registrar has a judicial discretion to proceed with the hearing of the petition and to make an adjudication of bankruptcy upon it, and is not bound to wait for a final decision of a Court of Appeal on the validity of the debt.

If, however, he is satisfied that a *bonâ fide* appeal is pending from the judgment of the Court of first instance, he ought to adjourn the further hearing of the petition until after the appeal is disposed of.

Before fixing a day for continuing the proceedings on the petition, the Registrar is bound to require the production of the judgment establishing the debt, or an office copy of it.

But, if the day is fixed irregularly, without the production of the judgment, the irregularity will be waived by the appearance of the debtor or his solicitor on the day fixed without taking the objection, which cannot then be raised at any subsequent stage of the proceedings.

Held, that an appeal from an adjudication of bankruptcy ought to stand over pending the trial of an action, the result of which, it was alleged by the Appellant, would be to render a fund available to satisfy the debt claimed by the petitioning creditor.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 13th of February, 1880, *Lancelot Lane*, a solicitor, and Messrs. *Lane & Bullford*, solicitors, served a debtor's summons on *J. P. Yeatman*, a barrister, describing him as of No. 6, *King's Bench Walk, Temple*. The summons claimed payment of £200 8*s.* 8*d.*, with interest, being as to the sum of £85 2*s.* 2*d.*, part thereof, an amount of costs which by virtue of two orders of the Chancery Division of the High Court, made on the 10th and 17th of September, 1879, in an action of *Yeatman* v. *Snow*, and the Taxing Master's certificate thereunder, *Yeatman* had been ordered to pay to *Lane*, and as to £115 6*s.* 6*d.*, the residue thereof, an amount of costs which *Yeatman* had by virtue of another order in the same action, made on the 8th of October, 1879, and the Taxing Master's certificate thereunder, been ordered to pay to *Lane*, and *Lane & Bullford*. *Yeatman* disputed the debt, and applied to the Court

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to dismiss the summons, and on the 26th of April, 1880, his application was dismissed. He did not comply with the summons, and on the 3rd of May, 1880, the summoning creditors presented a bankruptcy petition against him in respect of the £200 8*s.* 8*d.*, alleging as an act of bankruptcy the non-compliance with the debtor's summons. The 28th of May was appointed for the hearing of the petition. On the 22nd of May *Yeatman* gave notice of his intention to dispute the making of an adjudication against him and the validity of the petitioning creditors' debt on various grounds, one of which was that an appeal was pending with reference to the taxation of the costs referred to in the above-mentioned three orders in the action of *Yeatman* v. *Snow*. This appeal arose as follows: On the 25th of February, 1880, *Yeatman* had taken out a summons in the action to review the Taxing Master's taxation of the costs referred to in the three orders. Vice-Chancellor *Malins*, on the 10th of April, 1880, made an order that *Yeatman* should be at liberty to pay into Court on or before the 24th of April, 1880, the sum of £50 as a condition precedent to the summons being further heard, and that, in default of this payment being made, the summons should be dismissed. *Yeatman* had given notice of appeal from this order. On the 28th of May the bankruptcy petition came on to be heard by Mr. Registrar *Pepys*, when an order was made that the proceedings on the petition should be stayed until the Court of Appeal should have come to a decision on the appeal then pending with regard to the summons to review the taxation. The appeal was heard by the Court of Appeal on the 9th of June, 1880, and the order of the Vice-Chancellor was discharged. The summons to review the taxation came on for hearing again by Vice-Chancellor *Malins* on the 10th of July, 1880, and was then dismissed with costs. *Yeatman* gave notice of appeal from this decision. On the 23rd of July the solicitors for the petitioning creditors gave notice to *Yeatman*, or his solicitors, that the Registrar had appointed the 13th of August, 1880, to proceed with the hearing of the bankruptcy petition. On obtaining this appointment no office copy of the order of Vice-Chancellor *Malins* of the 10th of July was produced to the Registrar. On the 6th of August, 1880, the appeal from the order of the 10th of July was heard by the Court of Appeal, when the Court expressed an

opinion that there was no ground for reviewing the taxation. But, it being suggested by *Yeatman* that the Respondents had moneys of his in their hands applicable to the payment of the costs, the further hearing of the appeal was ordered to stand over until the 10th of November, to give him an opportunity of adducing further evidence. On the 13th of August the bankruptcy petition came on for hearing again before the Registrar. *Yeatman's* solicitor attended on his behalf, and took no objection to the regularity of the order fixing the day, and the following order was made: "It being admitted that in the appeal now pending before the Court of Appeal in an action of *Yeatman* v. *Snow* the question of whether the Petitioners have in their hands moneys sufficient and applicable for the payment of the costs mentioned in the petition remains still to be decided, it is ordered that the further hearing of this petition be further adjourned until the 12th of November, 1880." A copy of this order was on the 11th of November, 1880, served by the Petitioners' solicitors on *Yeatman*, by leaving it with his clerk at his chambers, No. 1, *Elm Court*, *Temple*, he having changed his chambers since the presentation of the petition. The same day a notice from the office of the Court of Bankruptcy of the appointment was also left at *Yeatman's* chambers with his clerk. *Yeatman* was not then in *London*, and in fact he did not receive the notices until his return to *London* after the 12th of November. On the 10th of November the Court of Appeal, on the further hearing of the appeal from the order of the 10th of July, dismissed the appeal with costs. On the 12th of November the bankruptcy petition was heard by the Registrar, and an adjudication of bankruptcy was made against *Yeatman* in his absence.

From this adjudication *Yeatman* appealed.

The Appellant in person:—

The utmost strictness is necessary in proceedings to obtain an adjudication of bankruptcy. In this case the provisions of rule 43 of the Bankruptcy Rules, 1870 (1), have not been observed. No

(1) Rule 43: "Where proceedings on a petition have been stayed for the trial of the question of the validity of the petitioning creditor's debt, and such question has been decided in favour of the validity of the debt, the petition-

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proper notices were given of the time appointed for the hearing of the petition, and the original fixing of the further hearing was irregularly obtained, no copy of the order of Vice-Chancellor *Malins* having been produced to the Registrar. Moreover, the Registrar ought not to have fixed a day to proceed with the petition while an appeal was pending from the decision of Vice-Chancellor *Malins*. At any rate, no adjudication should be made now, inasmuch as there is an action pending before Mr. Justice *Fry*, the result of which will probably be to shew that the Respondents have funds in their hands available for the payment of the debt which they claim. That action will be tried in a few days.

Higgins, Q.C., and *Yate Lee*, for the petitioning creditors :—

If there was any irregularity in fixing the 13th of August for the further hearing, it has been waived by the appearance of the Appellant's solicitor on that occasion without taking the objection. And the order then made, adjourning the hearing until the 12th of November, was made in the presence of the Appellant's solicitor, and no further notice of the adjournment was necessary. It has always been the practice of the Court of Bankruptcy to fix a day to proceed with the petition when the validity of the debt claimed has been established by the judgment of a Court of first instance. This is the right construction of rule 43. If the Registrar was bound to wait for the result of an appeal, the proceedings might be kept hanging over for many months, or even for years, and this might have a serious effect on dealings with the debtor.

The Appellant, in reply :—

It would be open to any other creditor to petition for an adjudication, and no mischief would result from the delay.

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ing creditor may apply to the Registrar to fix a day on which further proceedings on the petition may be had, and the Registrar, on production of the judgment of the Court in which the question was tried, or an office copy thereof, shall give notice to the Petitioner by post of the time and place fixed for the hearing of the petition, and a like notice to the debtor at the address given in his notice to dispute."

JAMES, L.J.:—

I am of opinion that the technical objection founded on the non-compliance with rule 43 fails. There may have been an irregularity in obtaining the appointment for the 13th of August, and in the service of notice of it. But it would be impossible to carry on business if the person who appears upon a day irregularly appointed, without taking any objection, can afterwards go back to the irregularity and set aside the subsequent proceedings. The appearance of the Appellant's solicitor upon the 13th of August, without taking any objection to the regularity of the proceedings, appears to me to have amounted to a waiver of the irregularity, which was a mere matter of form. The solicitor ought to have taken the objection then, when the irregularity could have been set right at once. But when the solicitor appeared at the time appointed and made no objection, I think it would be impossible to allow the objection to be taken now, so as to render everything which has been done void, and to reopen the whole matter. And it appears to me that it was unnecessary that any fresh notice should be served on the Appellant of the appointment for the 12th of November, inasmuch as his solicitor was in Court when the order for the adjournment was made. The Appellant ought to have been present on the 12th of November to adduce such reasons as he might think fit against the adjudication. The objection is on a mere matter of form, and it ought not to be allowed to prevail now.

But the more serious objection arises out of the suggestion that in the action before Mr. Justice *Fry* a fund may be forthcoming which will be available to pay the debt claimed by the Respondents. If that is so, it is not desirable that an adjudication should be made. It is proper that the hearing of the appeal should stand over until after that action has been decided, when we shall be able to see whether there is any foundation for the Appellant's suggestion. The appeal will stand over for that purpose only.

COTTON, L.J.:—

I agree that the final adjudication of the appeal must stand over for the purpose indicated by Lord Justice *James*. But I think I ought also to express my opinion on the technical question

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which has been raised. The petition originally stood over for the trial of the question of the validity of the petitioning creditors' debt. That question was decided by Vice-Chancellor *Malins* on the 10th of July, and I think it was then perfectly competent to the petitioning creditors to apply to the Registrar, under rule 43, to fix a day for the further hearing of the petition. The course taken, however, was not strictly regular. The Vice-Chancellor had previously held that he could not enter into the merits of the summons to review the taxation, unless Mr. *Yeatman* first deposited £50 in Court as security. An appeal was pending from that decision, and the Registrar stayed the proceedings on the petition until the Court of Appeal should have come to a decision on the appeal then pending. The order was put in that form, but what was really intended was to stay the proceedings until the summons to review the taxation should have been adjudicated upon. The Court of Appeal was of opinion that the Vice-Chancellor ought to have entered into the merits of the summons, and sent it back to him that he might adjudicate upon the merits. When the Vice-Chancellor had, on the 10th of July, decided upon the merits, there was, in my opinion, a judgment in favour of the validity of the petitioning creditors' debt, and upon the production to him of an office copy of the judgment, the Registrar was entitled under rule 43 to fix a day for the further proceedings on the petition. Then came the irregularity. The Petitioners went to the Registrar, and, instead of producing an office copy of the Vice-Chancellor's judgment, simply told him that the appeal referred to in the order staying the proceedings had been disposed of, and he then fixed the 13th of August for the further hearing. This was an irregularity in the procedure, but neither Mr. *Yeatman* nor his solicitor took advantage of it at the proper time. His solicitor appeared without taking the objection upon the hearing on the 13th of August, and this appearance cured the technical defect. And the appointment of the 12th of November for the further hearing being simply an adjournment from the day which had been originally fixed, though irregularly, under rule 43, the ordinary rule applies that every person who appears upon the original hearing of an application, is bound also to appear upon an adjournment of that

hearing. Consequently there was no irregularity in fixing the 12th of November. I desire to add this. It is said that on the 13th of August there was an appeal pending from the judgment of Vice-Chancellor *Malins*, and that is so. But a judgment had been obtained establishing the validity of the petitioning creditors' debt, and, in my opinion, when that is so, and the judgment has not been reversed, the Registrar has power to proceed with the hearing of the petition, if in the exercise of his judicial discretion he thinks fit to do so. But if he is satisfied that a real appeal from the judgment is pending, he ought, in my opinion, as was done in the present case, to adjourn the hearing of the petition until after the appeal shall have been disposed of.

LUSH, L.J.:—

I have arrived at the same conclusion. I have no doubt that after the adjournment of the hearing it was not necessary to give the Appellant any fresh notice of the time fixed for the further hearing. The only doubt I have felt is as to the true construction of rule 43. It did at one time seem to me that when the rule speaks of the question being "decided" in favour of the validity of the debt, it necessarily refers to a final decision, and not merely to the decision of a Court of first instance. But it appears that it has always been the practice of the Court of Bankruptcy to construe the rule as meaning the decision of the Court of first instance, and to treat the rule as exhausted when the decision of such a Court has been obtained, and to consider it a matter of judicial discretion whether the hearing of the petition shall then proceed. And, when I consider the great inconvenience which might arise if a different course were adopted, and that this has always been taken to be the true construction of the rule, I cannot hesitate to agree in the view of my learned colleagues that, after the decision of the Vice-Chancellor, the rule was exhausted. I agree also as to the other point.

Solicitor for Appellant: *E. Hawkins.*
Solicitors for Petitioning Creditors: *Bolton, Robbins, & Busk.*

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1880

FRY, J.

Jan. 23, 24, 31.

C. A.

Nov. 9, 12, 15.

LLOYD'S *v.* HARPER.

[1879 L. 59.]

Guarantee—Construction—Determination—Death of Guarantor—Contract for Benefit of Third Party—Right to sue—Measure of Damages—Trustee.

In May, 1863, a father, on the occasion of the admission of his son as an underwriting member of *Lloyd's*, addressed to the managing committee of that body a letter, by which he held himself responsible for all his son's engagements in that capacity. *Lloyd's* was then a voluntary association, governed by certain by-laws, under which a person once admitted a member could not be excluded from membership except in the event of his bankruptcy or insolvency. The association consisted of underwriting members, non-underwriting members, and subscribers. The practice of the underwriting members was to underwrite policies of marine insurance for the benefit of various owners of property, both members of the association and outsiders, but the policies with outsiders could only be effected through the agency of insurance brokers who were either members of or subscribers to the association. The association as such incurred no liability on the policies underwritten by its members. In 1871 the society was incorporated by Act of Parliament, all the rights of the committee on behalf of the members being vested by the Act in the corporation. In 1876 the father died, and notice of his death was shortly afterwards given to *Lloyd's*. In 1878 the son became bankrupt, and thereupon ceased to be a member of *Lloyd's*:—

Held, by the Court of Appeal, affirming the decision of *Fry*, J.:—

(1.) That the guarantee was not determined by the death of the father or by the notice of it, but that his estate was liable in respect of engagements contracted by the son after his death:

(2.) That the guarantee extended to all engagements contracted by the son as an underwriting member of *Lloyd's*, whether with members or with outsiders:

(3.) That the committee of *Lloyd's*, and the corporation of *Lloyd's* as their successors, were trustees of the benefit of the guarantee for all the persons, whether members or outsiders, with whom the son had contracted engagements as an underwriting member, and that the corporation could maintain an action to enforce the guarantee against the father's estate for the benefit of all those persons; on the ground, as to the outsiders, that the brokers, through whom the son's engagements with them were contracted, were trustees for their principals of the right which they themselves

had to call on their own agents, *Lloyd's*, to enforce the guarantee for their benefit.

A guarantee the consideration for which is given once for all cannot be determined by the guarantor, and does not cease on his death.

Whether a guarantee for future advances, which the party guaranteed is not bound to make, is not determinable by the guarantor, and whether it does not cease on notice of his death, *quære.*

THIS was an action to enforce a guarantee against the executors of the guarantor.

The Plaintiffs, *Lloyd's*, were a society incorporated under the name of "*Lloyd's*," by *Lloyd's Act*, 1871 (34 & 35 Vict. c. xxi.), which is intituled "An Act for incorporating the members of the establishment or society formerly held at *Lloyd's Coffee House*, in the *Royal Exchange*, in the City of *London*, for the effecting of Marine Insurance, and generally known as *Lloyd's*, and for other purposes."

For many years prior to the passing of the Act *Lloyd's* had existed as a voluntary association in the nature of a club consisting of underwriters, insurance brokers, merchants, and others for the effecting of marine insurances, and for other purposes.

The association was, after the 30th of August, 1811, governed by the provisions of a deed of trust dated the 30th of August, 1811, and certain by-laws made in pursuance thereof, and was managed by a committee. By the deed of the 30th of August, 1811, the subscribers to the association covenanted with four persons, who had been appointed trustees on behalf of the association, their executors, administrators, and successors for the time being, that they would respectively duly observe, perform, fulfil, and keep all and singular the rules and regulations for the management of the affairs of the subscribers to *Lloyd's* for the time being, which had been theretofore passed and confirmed, and also all such further rules and regulations as should or might at any time thereafter be duly passed and confirmed by a majority of the subscribers for the time being. And it was agreed that a sum of £24,000 Consols, which had been transferred to the trustees, and a sum of £1093 12*s.* 11*d.*, then in the hands of the bankers of the association in the names of the trustees, and all other sums which should at any time thereafter be received by or come to the hands

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of the trustees, or their successors for the time being, should be held by them upon trust to indemnify the trustees, their executors, administrators, and successors, against the payment of the rent, taxes, repairs, and other outgoings of the premises occupied by or for the use and accommodation of the subscribers, and also against such other engagements or liabilities as the trustees or their successors might thereafter be directed or authorized to enter into, or might *bonâ fide* incur, for the use, benefit, or accommodation of such subscribers, and generally against all loss, costs, charges, and expenses whatsoever which the trustees, their executors, administrators, or successors, should reasonably expend or be put to in the exercise of their trusts or in relation thereto: Provided always, that, if it should at any time thereafter happen that the whole of the funds or moneys vested or to be vested in the trustees should be voted away by a majority of two general meetings, or paid by the trustees for the use or by the direction of the subscribers for the time being, or there should be no sufficient funds remaining in the hands of the trustees, then in either of such cases the subscribers did thereby severally and respectively covenant with the trustees to indemnify them, their executors, administrators, and successors for the time being, against all loss, costs and charges, which they might be put unto for or by reason of their having entered into any contract, covenant, or agreement, or incurred any liability for the use or by the authority of the society.

This deed was destroyed in the fire which took place at the *Royal Exchange*, in January, 1838, but a deed of accession thereto was executed in that year by the then members of the association, a copy of the deed of 1811 being set out in a schedule to the deed of 1838.

The by-laws which were in force in the month of May, 1863, contained (*inter alia*) the following provisions:—

"(1.) The subscribers to *Lloyd's* shall in future consist of three classes, viz.:—

"1st. Underwriting members, being members who have the privilege of underwriting.

"2nd. Non-underwriting members, being members who have not the privilege of underwriting.

"3rd. Annual subscribers."

"(3.) None but merchants, shipowners, bankers, traders, underwriters, and insurance agents are eligible as members of *Lloyd's* or annual subscribers."

"(12.) The committee have the power to decline to receive the subscription of any person, not being a member, whenever they may see fit; such proceeding to be determined by ballot. And if any member or subscriber shall become bankrupt or insolvent, or shall suspend payment, or shall take or apply to take the benefit of any Act for the relief of insolvent debtors, or shall place his affairs in the hands of inspectors or trustees, or shall make, or propose to make, any composition with his creditors, such member or subscriber shall thereupon cease to be a member or subscriber, and a minute thereof be entered on the proceedings of the committee."

"(20.) No member or subscriber shall underwrite for or open insurance accounts in the names of persons who are not members or subscribers, and any member or subscriber so acting shall forfeit his own subscription and shall cease to be a member or subscriber."

In May, 1863, *Robert Henry Harper* was a candidate for election as an underwriting member of *Lloyd's*, and on the 19th of May, 1863, his father, *Samuel Harper*, who had been himself a member of *Lloyd's* for many years, wrote a letter to the committee of *Lloyd's* as follows:—

"My son Mr. *Robert Henry Harper* being a candidate for admission to *Lloyd's* as an underwriting member, I beg to tender my guarantee on his behalf, and to hereby hold myself responsible for all his engagements in that capacity."

R. H. Harper was thereupon elected by the committee, and admitted as an underwriting member of *Lloyd's*, and he thenceforth proceeded to contract engagements in that capacity, by underwriting and becoming liable upon policies of marine insurance to various persons, until he stopped payment in November, 1878. The business of underwriting members of *Lloyd's* consisted to a great extent in underwriting policies of insurance in favour of merchants and others who were not members of *Lloyd's*, such

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policies being effected through the agency of insurance brokers who were members or subscribers.

The preamble of *Lloyd's Act*, 1871, contained a recital that the society was regulated by a deed of association of the 30th of August, 1811, "which deed, or a deed of accession referring thereto, has usually been from time to time executed by the several members of the society," and the Act contained (*inter alia*) the following provisions:—

Sect. 1 provided that on the passing of the Act the deed of the 30th of August, 1811, and any deed of accession thereto, should be annulled. Sect. 2 provided that the then members of the committee and all persons admitted as members of *Lloyd's* before or after the passing of the Act should be thereby united into a society and corporation for the purposes of the Act, and for those purposes should be thereby incorporated by the name of "*Lloyd's*," and by that name should be one body corporate with perpetual succession.

Sect. 4. "All property and rights of or to which the committee for managing the affairs of *Lloyd's*, or any person on their behalf, or any trustee for that committee or for the members of *Lloyd's*, are or is possessed or entitled at law or in equity at the passing of this Act, shall, by virtue of this Act, belong to the society to the same extent and for the same estate and interest as the same respectively is and are at the passing of this Act vested in that committee, person, or trustee, and may be held, used, and enjoyed accordingly; and all trustees for the establishment or society as it existed before the passing of this Act, or for that committee, shall be and continue trustees for the society, as nearly as may be as if this Act had not been passed."

Sect. 5. "Notwithstanding the annulling by this Act of the aforesaid deeds of association and accession, and the incorporation by this Act of the society, all deeds of trust, leases, mortgages, bonds, contracts, agreements, securities, transfers, and other acts and things before the passing of this Act made, entered into, executed, or done by or with the committee for managing the affairs of *Lloyd's*, or any person or trustee as aforesaid, shall be as good, valid, and effectual to all intents for, against, and with reference to the society, as they would have been for, against, or

with reference to such committee if this Act had not been passed, and may be proceeded on, executed, used, dealt with, and enforced accordingly, the society being only substituted in or in relation thereto respectively for such committee."

Sect. 22. "If any member of the society becomes bankrupt or insolvent, or suspends payment, or places his affairs in the hands of inspectors or trustees, or proposes any composition with his creditors, he shall thereupon cease to be a member."

Sect. 25. "No bye-law shall be made by the society providing for exclusion from membership of the society for any cause."

Sects. 36 and 37 contained provisions for the indemnity of the trustees of the corporation out of its capital stock and by the members similar to the provisions for that purpose contained in the deed of the 30th of August, 1811. The Act also provided that the affairs of the society should be managed by a committee.

Samuel Harper died on the 15th of September, 1876, and notice of his death was shortly afterwards given to the committee of *Lloyd's*.

This action was commenced in March, 1879, by *Lloyd's* and a firm of *R. S. Jones, Price, & Co.*, as Plaintiffs, against the executors of *Samuel Harper* (of whom *R. H. Harper* was one) as Defendants. *R. S. Jones, Price, & Co.* were insurance brokers, to whom at the time of his failure *R. H. Harper* was indebted in the sum of £134 8*s.* 5*d.* on the balance of an account in respect of policies underwritten by him after the death of *Samuel Harper*.

The Plaintiffs alleged that *R. H. Harper* had also, as a member of *Lloyd's*, underwritten policies effected by other persons to a large amount, and that considerable sums of money were due and owing from him upon such policies, and that some of the persons to whom those sums were due had called upon the Plaintiffs *Lloyd's* to enforce for their benefit the guarantee given by *Samuel Harper*.

The Plaintiffs claimed a declaration that the death of *Samuel Harper* did not operate to revoke the guarantee, and that the Defendants might be ordered to pay to *R. S. Jones, Price, & Co.* the amount due to them under the guarantee, and that the persons entitled to the benefit of the guarantee and the amounts of their claims respectively might be ascertained and determined, and that

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the Defendants might be ordered to pay the same, and that their liability upon the guarantee might be discharged. Also that the Defendants might admit assets of their testator, or else that his estate might be administered by and under the direction of the Court.

By their statement of defence the Defendants insisted that, at any rate from the time when the committee of *Lloyd's* became aware of the death of the testator, no liability was incurred by his estate under the guarantee in respect of any contract afterwards entered into by *R. H. Harper;* that *Lloyd's* were under no liability in respect of any of the policies underwritten by *R. H. Harper;* and that the persons to whom moneys were due in respect of policies underwritten by *R. H. Harper* had no right to require *Lloyd's* to enforce for their benefit the testator's guarantee. The Defendants also insisted that there was no privity of contract between the testator's estate and the firm of *Jones, Price, & Co.*, or any of the members thereof.

The assistant secretary of *Lloyd's* gave evidence to the following effect: Of the twelve persons who constituted the committee of *Lloyd's* when the testator's guarantee was given, only five or six were surviving when the action was commenced. The system of requiring guarantees to be given on behalf of persons becoming underwriting members was introduced in the year 1856. In 1863, out of thirty members admitted, guarantees were taken from twelve. The practice became general about 1869. An insurance broker who was not a member or subscriber would have no right to enter the rooms to inquire about the guarantee or security given by a member. A member or subscriber would obtain information about it if he asked. The guarantee itself would not be shewn without the express authority of the committee, but the person inquiring would be told that there was a guarantee of the usual amount. The usual amount was £5000.

Some of the members or former members of the committee of *Lloyd's* deposed that the object of requiring a guarantee was the maintenance of the character and credit of *Lloyd's* by insuring to the brokers and others bringing business to the underwriting members that a provision existed for the payment of the claims on their policies effected at *Lloyd's*, and it was never the purpose

of such guarantees to protect the society as such against any liability it might incur in its corporate character. The object, as two of the witnesses said, was to maintain "the credit of the room."

The firm of *Jones, Price, & Co.* was composed of three partners, of whom one was a member of *Lloyd's*, another was a subscriber, and the third was neither member nor subscriber.

North, Q.C., and *Millar*, for the Plaintiffs :—

The main question is whether the guarantee was determined by the testator's death or by notice of his death to *Lloyd's*. We say that it was not. The guarantee was given for the engagements of a person who could not be excluded from *Lloyd's*, or removed from being a member, except under very special circumstances. He ceased to be a member by his bankruptcy, but the engagements now in question were entered into by him before the bankruptcy. The guarantee was from its nature a continuing one; it was intended to remain in force so long as the son should continue to be an underwriting member of *Lloyd's*. Its object would be entirely defeated if it could be determined by notice, or by the death of the guarantor a month or a year after it was given. Under such circumstances the guarantee continues so long as the person for whom it is given retains the *status* which he acquired on the faith of it: *Gordon* v. *Calvert* (1); *Calvert* v. *Gordon* (2); *Bradbury* v. *Morgan* (3); *Offord* v. *Davies* (4); *Burgess* v. *Eve* (5); *Harriss* v. *Fawcett* (6). In that case there is a *dictum* of Lord Justice *Mellish* to the effect that a guarantee which was determinable by six months' notice was not determined by the death of the guarantor, no notice having been given.

[*Cookson*, Q.C. :—In *Williams* on Executors (7) it is said : "If a man enters into a continuing guarantee and dies, his executor, it has been thought, is not liable upon it for advances made after the testator's death, which operates as a revocation."

(1) 2 Sim. 253; 4 Russ. 581.
(2) 1 Man. & Ry. 497; 3 Ibid. 124.
(3) 1 H. & C. 249.
(4) 12 C. B. (N.S.) 748.
(5) Law Rep. 13 Eq. 450.
(6) Law Rep. 15 Eq. 311; Ibid. 8 Ch. 866.
(7) 7th Ed. p. 1770.

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FRY, J., referred to *Smith's* Mercantile Law (1), where it is said "the death of the surety does not *per se* operate as a revocation."]

Phillips v. *Foxall* (2) is not inconsistent with the other authorities.

The evidence shews, and, indeed, it is clear without the evidence, that the object of the guarantee was to give a security to the persons, who should deal with a member of *Lloyd's*, that his engagements with them would be fulfilled, and this applies to engagements entered into by him with outsiders as much as to engagements with other members of *Lloyd's*. The guarantee covers all underwriting engagements of the son as a member of *Lloyd's*.

Lloyd's are entitled to maintain the action on behalf of all the persons, whether members or not, for whose benefit it was entered into. This is not the case of a mere stranger to a contract seeking to enforce it: *Colyear* v. *Countess of Mulgrave* (3).

Cookson, Q.C., and *Cracknall*, for the Defendants:—

1. *Lloyd's* cannot maintain the action, for they are not the legal successors of the committee of 1863 with whom the contract of guarantee was entered into. The contract was entered into in 1863 with twelve gentlemen, who then formed the committee of the voluntary association called *Lloyd's*. The present corporation called *Lloyd's* are not their legal successors, and the survivors of the twelve committee men are not parties to the action. The effect of the Act of 1871 is to substitute the corporation for the committee so far only as they could sue as a committee, and that they could not do at all.

2. On its true construction, the guarantee at the most extends to protect engagements between the son and other members of *Lloyd's*, excluding any engagements with subscribers and with mere outsiders. Indeed, the words of the guarantee may be satisfied by confining its operation to the liability of a member of *Lloyd's* to pay his subscription and to indemnify the trustees.

3. The guarantee was determined by the death of the testator, or at any rate by the notice of his death to *Lloyd's*.

The son entered into a number of contracts, which were several

(1) 8th Ed. p. 468. (2) Law Rep. 7 Q. B. 666.
(3) 2 Keen, 81.

contracts. There is nothing unreasonable in saying that the guarantee was a severable contract, and that the point of severance was the death of the father.

[FRY, J.:—If so, it might be severed at any time by notice, and the result would be that *Lloyd's* might be saddled with a member whose credit was not good, without there being any guarantee for the fulfilment of his engagements.]

The words "all his engagements" do not necessarily mean all his engagements from time to time or during his life. There is no rule of law that a continuing guarantee cannot be determined by the death of the guarantor. When a guarantee is given for advances to be made by a banker from time to time to his customer, the guarantee is determined by notice to the banker of the death of the guarantor, and it would not extend to advances made by the banker to the customer after that notice: *Harriss* v. *Fawcett* (1); *Coulthart* v. *Clementson* (2). On the other hand, no doubt, when consideration has been given for the continuing of the guarantee, the contract binds the estate of the guarantor, and notice of his death would amount to nothing more than a notice that the remedy would have to be enforced against a new party. The judgment of Vice-Chancellor *Malins* in *Burgess* v. *Eve* (3) supports our argument, and that judgment was approved of in *Phillips* v. *Foxall* (4). If the guarantee could not be determined, the result would be that the testator's estate might be subject to an unlimited liability as long as the son remained an underwriting member of *Lloyd's*, and while that liability continued the estate could not be distributed. This could not have been the intention of the parties.

[FRY, J.:—The object of the guarantee was to maintain the good credit of *Lloyd's* rooms, and in that point of view what could it signify whether the father was living or dead?]

The credit of the rooms would not be secured, for, under the 12th of the by-laws which were in force in 1863, a member could be removed in the event of his bankruptcy and insolvency,

(1) Law Rep. 15 Eq. 311; Ibid. 8 Ch. 866.
(2) 5 Q. B. D. 42.
(3) Law Rep. 13 Eq. 450.
(4) Law Rep. 7 Q. B. 666.

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and that would injure the credit of the rooms. Even a guarantee under seal may be put an end to: *Shepherd* v. *Beecher* (1).

[FRY, J.:—In that case there had been contributory negligence on the part of the master, the fidelity of whose apprentice had been guaranteed.]

But the father was held liable for the full amount of his bond. In *Burgess* v. *Eve* (2) Vice-Chancellor *Malins* expressed an opinion that a bill might be filed by a guarantor for the delivery up of his guarantee after notice that the person for whom it had been given was not to be trusted. And both the Vice-Chancellor, and the Court of Queen's Bench in *Phillips* v. *Foxall* (3), regarded *Shepherd* v. *Beecher* as an authority for that view. *Shepherd* v. *Beecher* was not cited in *Calvert* v. *Gordon* (4), and it is inconsistent with *Burgess* v. *Eve* and with the *dictum* of Lord Justice *Mellish* in *Harriss* v. *Fawcett* (5).

4. *Lloyd's* cannot maintain the action for anything more than nominal damages, for they have not sustained any damages themselves, and they are not trustees for the policy-holders; and their co-Plaintiffs would have no right at all to sue alone, for there was no privity of contract between them and the testator. *Lloyd's* are under no obligation to indemnify the persons with whom *Harper*, the son, has entered into engagements on policies, and they are not trustees for those persons. There is nothing to shew the existence of any trust. *West* v. *Houghton* (6) is precisely in point. There, in a lease of sporting rights over an estate, the lessee covenanted to keep down the rabbits on the estate, so that no appreciable damage might be done to the crops, and it was held that the lessor, being under no obligation to compensate the farming occupier for damages to the crops, and not being a trustee for him, could not recover more than nominal damages for the breach of the covenant. In the present case *Lloyd's* are not trustees of the benefit of the guarantee for any of the persons with whom *Harper*, the son, has entered into engagements on policies, whether those persons are members of *Lloyd's*

(1) 2 P. Wms. 288.
(2) Law Rep. 13 Eq. 450, 459.
(3) Ibid. 7 Q. B. 666.
(4) 3 Man. & Ry. 124.
(5) Law Rep. 15 Eq. 311; Ibid. 8 Ch. 866.
(6) 4 C. P. D. 197.

or outsiders; there is nothing to shew that any such trust was created, and the Court will not infer its existence.

[FRY, J.:—Suppose that in *West* v. *Houghton* (1) the existence of the covenant had been held out to the farming tenant as an inducement to take the farm? The result might have been different.]

There is nothing of the kind in the present case. *Robertson* v. *Wait* (2) is distinguishable from *West* v. *Houghton*. There the contract contained an express provision for the benefit of a third party by name, and he was in equity a co-contractor, and it was held that the plaintiffs were trustees for him.

[FRY, J.:—The contract only shewed that the plaintiff had contracted for a benefit to the third party.]

A trusteeship for a third party will not be implied when he is not named in the contract.

[FRY, J.:—In *Lamb* v. *Vice* (3) the *cestui que trust* was not named. There a bond had been given by an officer of the Palace Court to the Knight Marshall of the Court for the due discharge of the duties of his office, and (*inter alia*) that he would take sufficient bail from all defendants arrested. He having taken insufficient bail from a defendant, it was held that the Knight Marshall could sue on the bond, he being a trustee for the plaintiff in the action against the defendant whose bail was insufficient.]

The joinder of *Jones, Price, & Co.* as co-Plaintiffs will not sustain the action. They could not have sued alone, for they were not parties to the contract: *Colyear* v. *Countess of Mulgrave* (4); and they have given no consideration for it. *Price*, who was a member of *Lloyd's*, must have known when *Harper*, the son, was admitted a member, and the assistant secretary's evidence shews that at that time it was not the common practice to require guarantees. *Price* admits that he did not actually know of this guarantee. It is not even alleged in the pleadings that *Lloyd's* were trustees for any one, nor that *Jones, Price, & Co.* contracted with *Harper*, the son, on the faith of the guarantee.

(1) 4 C. P. D. 197.
(2) 8 Ex. 299.
(3) 6 M. & W. 467.
(4) 2 Keen, 81.

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North, in reply:—

[FRY, J.:—I wish to hear you as to the engagements which the son entered into with persons who were not members or subscribers to *Lloyd's*.]

Most of the engagements entered into by members of *Lloyd's* are with outsiders, but the contracts are made through brokers who are subscribers.

[FRY, J.:—The contract is made with the outsider.]

The guarantee must have been intended to extend to engagements with outsiders; its words extend to all engagements, and the object was to maintain the honour of the house. There is nothing in the policy of the law contrary to such a construction of the guarantee. It is like the administration bonds which are always given to the Judge of the Probate Division. The brokers who are employed by outsiders are members of, or subscribers to, *Lloyd's*, and are bound by its rules, and are entitled to the benefit of them. Their principals stand in the same position. This has been frequently so held with reference to contracts on the *Stock Exchange*. A reasonable construction must be given to the guarantee. *Robertson* v. *Wait* (1) shews that *Lloyd's* can maintain the action, and *Tomlinson* v. *Gill* (2), *Gregory* v. *Williams* (3), and *Touche* v. *Metropolitan Railway Warehousing Company* (4), are authorities to the same effect. *West* v. *Houghton* (5) is distinguishable, for in that case there was not a fiduciary *nexus* between the plaintiff and the third party. In the present case there is such a relation. It was known to all the persons who dealt with the underwriting members of *Lloyd's* that, at any rate in some cases, those members were required to find guarantees for the fulfilment of their engagements. *West* v. *Houghton* was decided upon the old common law rule that a person who was not a party to a contract could not sue upon it. If the lease to the farming tenant had contained a recital of the covenant in the operating lease, the result would have been different.

(1) 8 Ex. 299.
(2) Amb. 330.
(3) 3 Mer. 582.
(4) Law Rep. 6 Ch. 671.
(5) 4 C. P. D. 197.

Cookson, in reply as to the new cases cited :—

If those cases apply, then the outsiders with whom contracts were entered into through the medium of insurance brokers could themselves compel *Lloyd's* to sue on their behalf on the guarantee, and could thus recover the full amount of their losses, without any regard to the credit of *Lloyd's* rooms.

FRY, J. :—

I am about to express my opinion on the various questions which have been laid before me, with this reservation, that, with regard to one of them, I desire to look further into the cases, and if I should see any reason to alter the opinion I now express, I will do so, and of course the judgment will not be drawn up until I have mentioned the case again.

[His Lordship read the guarantee, and stated the circumstances under which it was given, and continued :—]

Now the first question is, whether the word "engagements" means engagements with all persons, or only engagements with *Lloyd's*, or with members of *Lloyd's*, or subscribers to *Lloyd's*.

The second question is, whether the guarantee was determined by Mr. *Samuel Harper's* death, and the notice of his death which followed a few days afterwards.

A guarantee, like every other contract, must be construed reasonably ; it must be construed by the words used, but also with regard to the surrounding circumstances. In considering what were the surrounding circumstances in this case, it must be observed that in the year 1863 *Lloyd's* was a voluntary society or club constituted under a deed of 1838, which referred to an earlier deed of 1811, and, according to the terms of that deed, each person who became a member of *Lloyd's* contracted to observe all the by-laws and regulations for the time being in force in respect of that society, and further contracted to indemnify the managing committee of the society against any loss they might incur in that capacity. The objects for which the society was constituted are, as I conceive, accurately stated in sect. 10 of the Act of 1871, which defines the objects of the society to be "The carrying on of the business of marine insurance by members of the society ; the protection of the interests of members of the society in respect of

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shipping and cargoes and freight; the collection, publication, and diffusion of intelligence and information with respect to shipping." The persons eligible as members of the society in 1863 were none but merchants, shipowners, bankers, traders, underwriters, and insurance agents. It was further provided by the by-laws that no member or subscriber should underwrite for or open insurance accounts in the names of persons not members or subscribers. Of course, the society as a whole would naturally be desirous to support the honour and credit of the house, and that for many reasons. In the first place, they were a body of persons competing for the business of insurance with other bodies. It is notorious that there are two ancient marine insurance companies carrying on large business in the city of *London*, and that there are spread over the country various insurance clubs, and it is obvious that every member of the society would have an interest in the honour and fair fame of *Lloyd's Room* in its competition with other assuring bodies. It is obvious, also, that that could only be effected by the underwriting members of *Lloyd's* paying in full the amounts for which they might underwrite. That appears to me obvious from the very nature of things. I must add that, according to the by-laws in existence in 1863, Mr. *Robert Henry Harper*, when once admitted a member of the society, could not be excluded from it by the committee, except in certain contingencies, which may be stated shortly as those of bankruptcy, insolvency, and similar events. The relation, therefore, which was created by the admission as a member of *Lloyd's* was a continuing relation in the ordinary sense of the word, and, although no doubt the member himself might determine it, the committee could not, except in certain contingencies. The letter of Mr. *Samuel Harper* was addressed to the committee for managing the affairs of *Lloyd's*, and it is evident that his object was to obtain the admission of his son as an underwriting member of that body, and thereby to gain for him all the advantages and means of livelihood which would follow from that admission. The effect of that would, therefore, be to create a continuing relation between Mr. *Harper*, the son, and the society.

Now, what would be the object and desire on the part of the

society? It would be this, to see that Mr. *Harper*, the intended member, should meet his engagements. The language of the guarantee is as large as can well be conceived. Mr. *Samuel Harper* holds himself "responsible for all his son's engagements in that capacity," that is to say, in the capacity of an underwriting member of *Lloyd's*. It is said that the expression "all his engagements in that capacity" merely refers to the liability which he undertook by subscribing or assenting to the deed of 1838, by which he contracted to observe the by-laws and regulations of the society, and to indemnify the committee. I ask myself, are those liabilities all his engagements in his capacity as an underwriting member, and the answer must be, No. I cannot, therefore, confine the guarantee to those liabilities. Then it is said that it refers only to his engagements with members of the society. Why? The interest of the house was that he should fulfil his engagements to outsiders as well as to members of the house, and as a matter of fact it cannot be doubted that his engagements would be principally with outside persons, that is to say, persons with whom he would contract by underwriting policies brought to him on behalf of merchants or owners of property by insurance brokers, who by the terms of the rules must be members of the house, or subscribers. There is nothing whatever in the nature of things or in the words used to confine the guarantee to engagements *inter socios;* on the contrary, the words are emphatic: "all his engagements." I cannot, therefore, confine the guarantee to engagements with members of the house.

In the next place, it is said that the guarantee terminated with Mr. *Samuel Harper's* death, or with his death and the notice of it to *Lloyd's*. But Mr. *Harper's* death was a matter of total indifference to the governing body of *Lloyd's*. They were, of course, anxious that the liabilities undertaken by his son, both during the father's lifetime and after his death, should be met, and, considering that the right of the son to continue an underwriting member did not determine by his father's death, it seems to me unreasonable to confine the father's guarantee to his own lifetime. If the guarantee be determined by an event which does not determine the son's membership, the result is that the guarantee is not commensurate with its object; the relief is not co-extensive with the

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mischief; and why should I so confine the guarantee when its language is as general as it possibly can be?

It appears to me that there are cases which certainly go to shew that, where a continuing relationship is constituted on the faith of a guarantee, there is a strong reason for holding that the guarantee cannot be annulled during the continuance of that relationship. This seems to me to be a sound principle of interpretation, and, applying it to the present case, I hold that the estate of Mr. *Harper*, the father, remained liable so long as his son continued an underwriting member of *Lloyd's* upon that admission.

The case on which I principally rely as corroborating the conclusion to which I have come is *Calvert* v. *Gordon* (1). There one *Richard Edwards* had been employed as a collecting clerk to the brewers *Calvert & Co.* By the terms of the bargain between them (this fact appears, I think, from the other reports, and not from that to which I am now referring) the engagement might be determined on notice by either party. *Alexander Gordon* became surety for *Richard Edwards*, and agreed to make good to *Calvert & Co.* all loss incurred by them from him during the continuance of *Edwards'* service. *Alexander Gordon* died, and his executrix gave notice as executrix to *Calvert & Co.* that she would no longer be responsible on the guarantee. In giving notice as executrix she clearly gave notice of the death of the testator. There was therefore a plea setting up the death of the testator, notice of his death, and notice of the desire of the legal personal representative to put an end to the guarantee, and that was in a case in which the persons to whom the notice was given had the power, by virtue of their contract with their servant, of determining his employment. Nevertheless, Lord *Tenterden*, on a motion in arrest of judgment, came to the conclusion that the notice was immaterial. He said (2), "It would be a hardship upon the master if this could be done"—that is, if the surety's liability could be determined by notice. "It is said that it would be a hardship on the surety, if his liability must necessarily continue during the whole time that the principal remains in the service; but, looking at the instrument itself, it would appear that it was the intention of the testator to enter into this unlimited engage-

(1) As reported, 3 Man. & Ry. 124. (2) 3 Man. & Ry. 128.

ment. It was competent to him to stipulate that he should be discharged from all future liability, after a specified time after notice given. This he has not done."

I come, therefore, to the conclusion that the whole of the liabilities of Mr. *Harper*, the son, during his continuance as an underwriting member of *Lloyd's*, were guaranteed by the late Mr. *Samuel Harper*.

I ought to add that *Burgess* v. *Eve* (1) has been pressed very much upon me as an authority in the opposite direction, but it appears to me that it has very little to do with the present question. The Vice-Chancellor in his judgment commented on the case of *Shepherd* v. *Beecher* (2), which was the case of a guarantee given for the faithful services of a servant, and the view of the Vice-Chancellor was that, when the servant has proved himself unfaithful, and the master chooses to continue the employment after knowledge of that unfaithfulness, the guarantee either comes to an end, or may be determined on notice by the guarantor. The circumstances there relied upon were circumstances affecting the position of the person against whose acts the guarantee was given; they had nothing whatever to do with a case like the present, where it is alleged that the guarantee may be determined, not by anything resulting from the acts of the person guaranteed, but by the mere death of the guarantor. But the death of the guarantor has, I repeat, nothing to do with the object of the guarantee.

In the next place, it has been urged that the Plaintiffs cannot succeed because the letter of May, 1863, was addressed by Mr. *Harper* to the committee for managing the affairs of *Lloyd's*, which consisted of twelve persons, of whom five only are now living. The right of action, it is said, is in those five persons; they are not joined as Plaintiffs, and therefore the Plaintiffs must fail.

But it seems to me that the effect of sect. 4 of the Act of 1871 is this, that the five now surviving members of the committee, or whoever may have been the survivors at the time of the passing of the Act, were persons in whom the right to sue on the guarantee was vested on behalf of the members of *Lloyd's*, and that the

(1) Law Rep. 13 Eq. 450. (2) 2 P. Wms. 288.

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rights which were then vested in them passed to the society to the full extent to which they were interested. The 5th section of the Act provides "that all contracts before the passing of this Act entered into with the committee for managing the affairs of *Lloyd's*, or any person or trustee as aforesaid," that is to say, any person on behalf of the committee, or any trustee for the committee or for the members of *Lloyd's*, shall vest in the corporation of *Lloyd's*. It appears to me to be clear under this section that the contract vested in the surviving members of the committee would become vested in the corporation of *Lloyd's*. That ground of defence, therefore, in my judgment fails.

In the next place, it is said the Plaintiffs cannot recover more than nominal damages, because the claim now made is not in respect of any liability of *Lloyd's* as a body corporate, but is in respect of the liability of Mr. *Robert H. Harper* to persons who have effected insurances with him, and it is further urged that the co-Plaintiffs, *Jones, Price, & Co.*, are not members of *Lloyd's*. It appears that one member of that firm is a member of *Lloyd's*, another is a subscriber, not a member, and the third is neither a member nor a subscriber. It appears to me that the reception of the letter of guarantee must be deemed to have been an act done by the committee on behalf of their constituents, their principals, that is, all the members of *Lloyd's*, and that the benefit of the letter would pass from time to time to the various persons who became members of *Lloyd's*, and that the committee would therefore hold it for all members of *Lloyd's*. I think that the committee, in taking that letter, and in admitting Mr. *Harper*, the son, as a member on the faith of it, were agents for the members, and that an agent who has obtained a contract within the scope of his agency cannot deny that he has made that contract for the benefit of his principal. Further than that, it seems to me that the insurance brokers who contract in *Lloyd's* room with underwriting members of *Lloyd's* on behalf of merchants and other owners of property, who may not be members of *Lloyd's*, become trustees for the benefit of those outside persons of the right which they have, as *cestuis que trust*, to call upon the committee, as their trustees, to enforce a contract entered into for their benefit, and that, in that way, the Plaintiffs *Lloyd's* are trustees also for

the outside persons for whose benefit they say they sue. That is, they are trustees of the guarantee for every person who has entered into a contract with an underwriting member of *Lloyd's*.

That is the view which at the present moment I entertain upon that question. But I desire an opportunity of looking into some of the cases which have been cited, and therefore it must not be considered that my present expression of opinion on that point is final. If I should not see any occasion to alter it, there will be a declaration that, according to the true construction of the guarantee, the estate of *Samuel Harper* is liable to satisfy all engagements contracted by *Robert Henry Harper*, in his character of an underwriting member of *Lloyd's*, down to the time of his suspension of payment, and not satisfied by him, whether such engagements were contracted with members of or subscribers to *Lloyd's* or with any other persons, and whether during the life of *S. Harper* or after his death. Then there will be an inquiry as to the amount of those engagements and what is payable in respect of them, and to whom, and a direction for payment accordingly.

Jan. 31. FRY, J.:—

I reserved this case for further consideration on one point, viz., how far substantial damages can be recovered by the Plaintiffs *Lloyd's* with whom the engagements against which the indemnity was given were not contracted. In my opinion the action can be maintained for the whole amount covered by the guarantee. It appears to me from the cases which were cited in the course of the argument, especially *Tomlinson* v. *Gill* (1) and *Lamb* v. *Vice* (2), that where a contract is made for the benefit and on behalf of a third person, there is an equity in that third person to sue on the contract, and the person who has entered into the contract may be treated as a trustee for the person for whose benefit it has been entered into.

In the present case I think the application of that principle is particularly clear. The contract was made with the committee of *Lloyd's*, that is, with the agents of the subscribers to *Lloyd's*.

(1) Amb. 330. (2) 6 M. & W. 467.

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Now, all the engagements which are covered by the guarantee are either engagements with subscribers to *Lloyd's* or engagements with strangers, but made through the intervention of subscribers to *Lloyd's*. Now, in the first case, that of engagements with subscribers to *Lloyd's*, it appears to me to be clear that the subscribers have a right to call on their agents, the committee or the corporation, to enforce the contract which they entered into with the testator for the benefit of those subscribers. In the second case, that of engagements with strangers effected through the intervention of subscribers, I think that each outsider has a right to require his agent, the insurance broker, to call upon his agents, the committee or corporation, to enforce the bargain for the benefit of the outsider. In that way, it appears to me that all those persons for whose benefit the contract was really entered into are entitled to call on *Lloyd's* to enforce it. *Lloyd's*, therefore, are trustees, and are entitled to judgment for the entire sum covered by the guarantee. The judgment which I have already pronounced will therefore stand.

C. A.

The Defendants appealed. The appeal came on for hearing on the 9th of November.

Cookson, Q.C., and *Cracknall*, for the Appellants:—

We say, in the first place, that "engagements" ought to be confined to the son's engagements with the committee. The word *primâ facie* points to engagements with the persons to whom the guarantee is addressed, and there is nothing to extend its meaning. Suppose a man becomes a member of the *Carlton Club*, and obtains a guarantee that he will fulfil his engagements. He then executes a deed by which he engages to indemnify the committee against liabilities incurred by them. Is it to be held that the guarantor is liable if through the insolvency of the member the obligations of this deed are not fulfilled? Even if the guarantee is not limited to the son's engagements with the committee, it ought, at all events, not to be held to extend to dealings with subscribers and outsiders, but only to dealings with members. In the next place, we say that, whatever be the construction of the guarantee, it determined as soon as the death of

Harper, the father, was known at *Lloyd's*: *Burgess* v. *Eve* (1); *Phillips* v. *Foxall* (2); *Coulthart* v. *Clementson* (3); *Offord* v. *Davies* (4).

[LUSH, L.J., referred to *Harriss* v. *Fawcett* (5).]

Bradbury v. *Morgan* (6) was disapproved of by the Master of the Rolls in *Harriss* v. *Fawcett*.

[JAMES, L.J.:—In the case of a guarantee for the price of goods a revocation of the guarantee does no harm, for the tradesman can stop supplying goods.

LUSH, L.J.:—*A.* agrees that if *B.* will grant a lease for fourteen years to *C.*, *A.* will guarantee the rent. That guarantee cannot be put an end to by *A.* during the term.]

The general understanding of the profession has been that a guarantee is revoked by the death of the guarantor: *Starkie* on Evidence (7); *Smith's* Mercantile Law (8); *Williams* on Executors (9); and numerous guarantees must have been entered into on the faith of that view. But supposing the guarantee in force, we contend that *Lloyds* cannot maintain the action, for that the Act only vests in them the rights of the committee as a committee. But if they can sue, they cannot recover substantial damages, for they are not injured: *West* v. *Houghton* (10). *Lloyd's* are not trustees for outsiders; the test is, could the outsiders have compelled *Lloyd's* to allow them to sue in the name of *Lloyd's*?

[JAMES, L.J.:—Suppose a landowner has let the sporting, taking a covenant for the protection of the land. He then lets the land subject to the lease of the sporting, and says to the tenant, "I have a covenant from the lessee of the sporting, which, if necessary, I will enforce for your benefit." Do you say that he can recover nothing but nominal damages?

COTTON, L.J.:—I apprehend that probably the landlord would be held a trustee of the covenant for the tenant, and entitled to recover substantial damages on his behalf.]

(1) Law Rep. 13 Eq. 450.
(2) Ibid. 7 Q. B. 666.
(3) 5 Q. B. D. 42.
(4) 12 C. B. (N.S.) 748.
(5) Law Rep. 15 Eq. 311; Ibid. 8 Ch. 866.
(6) 1 H. & C. 249.
(7) 2nd Ed. p. 371, n.
(8) 9th Ed. p. 474.
(9) 7th Ed. p. 1770.
(10) 4 C. P. D. 197.

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The cases in which substantial damages have been recovered by a person who is not himself injured rest on grounds which do not exist here. In *Robertson* v. *Wait* (1) the covenant was clearly entered into for the benefit of a third party, who suffered substantial damage. The covenantee was, therefore, a trustee of the covenant, and, moreover, the plaintiff himself had a substantial claim. In *Tomlinson* v. *Gill* (2) the covenantee had taken out administration and was a trustee. In *Gregory* v. *Williams* (3) the promise was made to a person having a legal demand against the promisor.

[COTTON, L.J.:—Sir *W. Grant*, who was no mean judge, appears to consider that the person for whose benefit the promise was made could enforce it in Equity.

JAMES, L.J.:—That case was very carefully considered in *In re Empress Engineering Company* (4), and the Master of the Rolls elaborately examined it.]

A trust for persons not named will not be so readily implied as for persons named. In *Lamb* v. *Vice* (5) a recognised practice was shewn that the officer should take bonds for the benefit of the suitors, and it was reasonably held that he could sue as trustee for them.

North, Q.C., and *Millar*, Q.C., appeared for the Respondents; but at the conclusion of the Appellants' argument the Court rose.

Nov. 15. JAMES, L.J.:—

We have had an opportunity of considering this case since it was on before, and we need not call on the Respondents.

The facts of the case are these. A gentleman of the name of *Harper* was minded to be introduced as what was called an underwriting member of *Lloyd's* Association, and in accordance with the custom which had been introduced some years before, and was in existence at that time, the committee before they admitted him to that position required a guarantee. His father,

(1) 8 Ex. 299.
(2) Amb. 330.
(3) 3 Mer. 582.
(4) *Ante*, p. 125.
(5) 6 M. & W. 467.

who was at that time I believe himself an underwriting member of *Lloyd's*, gave the guarantee to the committee in the following words: "My son *Robert Henry Harper*, being a candidate for admission to *Lloyd's* as an underwriting member, I beg to tender my guarantee on his behalf, and to hereby hold myself responsible for all his engagements in that capacity."

The first question which was raised on this appeal was, that upon the construction of that guarantee it did not extend to any liability under which the son might come to the outside world, but was confined to engagements which he might be under to indemnify the society itself, *i.e.*, to what might be called internal engagements. It appears to us to be impossible to put that construction on the guarantee. The words are "engagements in that capacity." In what capacity? In the capacity of an underwriting member. As it seems to me, neither the committee nor Mr. *Harper*, the father, who gave the guarantee, nor the son, could at the time doubt that what were meant to be guaranteed were the engagements the son might enter into as underwriter with the outside world, so as to prevent any default which would have redounded to the injury and discredit of the association, and it is clear to my mind that such is the true construction of the guarantee.

That being so, is there any limit to the guarantee? It was contended that it was limited to the lifetime of the guarantor. It appears to me impossible to say that it was so limited. It applies in terms to "all engagements in that capacity." Whether the engagements were entered into before or after the death of the father, it appears to me utterly impossible to say they were not engagements entered into by the son in the capacity of an underwriting member. The representatives of Mr. *Harper* are bound by Mr. *Harper's* guarantee, just as if he had entered into a covenant to indemnify a lessor against the breach by the lessee of the covenants of a lease. In order to support the contention that the guarantee was *ipso facto* determined at the death of the guarantor, it was contended that the guarantor could himself in his lifetime have revoked the guarantee, and that therefore it must be assumed that his death would operate in the same manner, that is to say, it is said we must assume that the

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executors, as it was their duty to do, have revoked the guarantee, and that matters are to be on the same footing as if the testator had exercised the option to determine it. Now the foundation of that contention appears to me utterly to fail. The testator, in my opinion, could not have determined the guarantee, and in that respect the case differs essentially from the case of *Coulthart* v. *Clementson* (1), in which Mr. Justice *Bowen* followed the decision in *Harriss* v. *Fawcett* (2) with regard to the effect of death in determining a guarantee. In those cases there is this distinction (whether it is sufficient to sustain them or not), that each advance of goods was a separate consideration. It may be considered equitable and right that where a man is not under any obligation to make further advances or to sell further goods, a person who has guaranteed repayment of such advances, or payment of the price of the goods, may say, "Do not sell any further goods or make any further advances; I give you warning that you are not to rely upon my guarantee for any further advances which you make, or for any further goods you sell." That might be in many cases a very equitable view. It perhaps might be hardly equitable for a banker or merchant to go on making advances after receiving a distinct notice from the guarantor that he would not be further liable. But here the consideration is given once for all, just as in the case of the granting a lease in which a third party guarantees the payment of the rent and the performance of the covenants. The father undertakes that if the son is admitted to the *status* of an underwriting member, he, the father, will guarantee all the son's engagements as such member. The moment the son was admitted to that *status* he became entitled to retain it until he had done some act which under the rules deprived him of his right to retain it. If the testator could at any time have determined the guarantee, he could have determined it the next day. The moment the son was admitted to the *status* of an underwriting member with all its privileges, if the father was at liberty to say, "I withdraw the guarantee," then the guarantee would have been utterly futile and idle. If it could not be determined by him the next day, there would be no time at which he could have a power of determining it. That being

(1) 5 Q. B. D. 42. (2) Law Rep. 15 Eq. 311; Ibid. 8 Ch. 866.

so, it appears to me that his estate is still liable for all the engagements which the son entered into with the persons who effected policies of insurance with him.

The only other point was one of a rather technical character. The Defendants say, "You *Lloyd's* have sustained no loss, and can only recover nominal damages, because you can only recover for your own loss and not for the losses sustained by other persons." That might be true if *Lloyd's* were not trustees, but I am of opinion that Mr. Justice *Fry* was well warranted in the conclusion at which he arrived, that the engagement was made with the committee as trustees for and on behalf of the persons beneficially interested. That brings the case within the authorities, of which there are more than one, viz., *Gregory* v. *Williams* (1), before Sir *William Grant, Lamb* v. *Vice* (2), and many other cases which proceed on an obvious principle, that if *A.* is trustee for *B.*, *A.* can sue on behalf of *B.* It is a very common case for a person to enter into a policy of insurance with a broker on behalf of the persons interested, it is one of the common forms of policy of *Lloyd's* itself, and nobody ever supposed that a broker could not sue on such a policy for the benefit of the persons interested. It appears to me therefore that that contention fails.

Then it was said that *Lloyd's* cannot sue because they are not the persons with whom the contract was made; but the Act of Parliament has transferred to *Lloyd's* as a corporation all the engagements which were entered into with the committee, or any person on their behalf. It is said that this enactment only applied to the committee existing at the time the Act was passed; but the old committee, in whom the right was vested, held it on behalf of the new committee, and it appears to me that, according to the plain meaning of the Act, the right was transferred to and vested in the corporation as the successor of the managing bodies which existed before their incorporation. Therefore it appears to me that every contention on the part of the Appellants has failed, and that the judgment of Mr. Justice *Fry* must be affirmed with costs.

COTTON, L.J.:—

I am of the same opinion. The last point mentioned by Lord

(1) 3 Mer. 582. (2) 6 M. & W. 467.

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Justice *James*, if it was a good one, went entirely to the root of the action, viz., that the Plaintiffs could not sue at all, because the right under the guarantee was not vested in them. But the 4th section of the Act of Parliament which incorporated the present *Lloyd's* Association provides that "all property and rights of or to which the committee for managing the affairs of *Lloyd's* or any person on their behalf are or is possessed or entitled at law or in equity" shall be transferred to the corporation. Now, although the committee at the time when this guarantee was entered into were not the committee at the time the Act was passed, the surviving members had this right of action vested in them on behalf of the then committee, and therefore the right of suing under this guarantee became vested in the Plaintiffs *Lloyd's*.

The first point to be considered is the construction of the guarantee. I have hardly anything to add upon that. There were two sets of members of *Lloyd's*—underwriting and subscribing members. Here the guarantee recites or states that the son proposes or desires to be admitted as an underwriting member, and it is a guarantee for all his engagements in that capacity. It was said that this was limited and confined to his engagements with members of the society, but there is nothing so to limit it. It refers to all his engagements in the capacity of an underwriting member. Were not his engagements on the policies which he underwrote as an underwriting member of *Lloyd's* engagements in his capacity of an underwriting member? In my opinion they were.

Then it was said that this was a contract only with a committee managing the affairs of *Lloyd's*, and was to be taken as only guaranteeing the son's engagements with that committee. But—and this is material on another point—the committee were, in my opinion, obtaining this guarantee not only on their own behalf (for of course this guarantee would cover all engagements with them made by Mr. *Harper*, jun., as an underwriting member), but for the benefit of all those with whom Mr. *Harper*, jun., should enter into contracts of insurance, and that being so, the words cannot be limited so as to confine them to engagements with the managing committee of *Lloyd's*.

I will next take the question of damages. It is said that,

assuming this guarantee to apply to all the son's engagements as an underwriting member, yet the Plaintiffs can get nominal damages only. The answer is this, that the Plaintiffs are suing here as trustees for the benefit of all those with whom Mr. *Harper*, jun., entered into contracts of insurance. That is quite supported by the cases referred to in the judgment of Mr. Justice *Fry*, *Gregory* v. *Williams* (1), before Sir *William Grant*, and the older case of *Tomlinson* v. *Gill* (2), before Lord *Hardwicke*. It appears from the note to 3 Mer. that in *Tomlinson* v. *Gill* the Plaintiff was a creditor, and Lord *Hardwicke* puts his decision upon the ground that the person with whom the contract was entered into must be treated as a trustee for all the creditors, and that therefore the *cestuis que trust* could sue in equity. Lord *Hardwicke* is represented as saying, "The plaintiff is proper for relief here for two reasons. He could not maintain an action at law, for the promise was made to the widow; but he is proper here, for the promise was for the benefit of the creditors, and the widow is a trustee for them." This principle is, I think, a good and sound one, and one upon which we can properly act, and are bound to act in the present case, treating the Plaintiffs *Lloyd's* as trustees for those for whose benefit this contract was entered into.

There is only one other point, and that partly turns upon the construction of this document and partly on what was said to be the law as regards guarantees. It was said that this guarantee was determinable, and was determined by notice of the death of Mr. *Harper*, sen. In my opinion that cannot prevail. When we look at the contract itself, it is in its terms entirely unlimited as regards the time during which the engagements guaranteed were to be entered into. It is a guarantee given in consideration of an act once for all done by the persons to whom the guarantee was given, that is to say, it was a guarantee given in the event of *Lloyd's* admitting the son into their association. That is a thing which is done once for all, and if the guarantee was recalled or put an end to the son could not, under any of the rules of *Lloyd's*, be turned out of the association because the guarantee was determined. Such determination was not provided for by the rules, and

(1) 3 Mer. 582. (2) Amb. 330.

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the association could not say that by reason of it the son had ceased to be a member of *Lloyd's*. In fact, it appears that at that time there was not a universal practice that there should be such a guarantee.

Now, how is it made out that the guarantee was determined by notice of death? It is said that the authorities have established this, that where there is a continuing guarantee for advances from time to time to be made to another person, that guarantee can be determined by the guarantor during his life and is put an end to by notice of his death. I give no opinion upon the question how far that is a correct statement of the law, because the point may come before the Court of Appeal and I do not wish to fetter myself by saying anything on the subject in a case where the point does not arise; but, assuming that the law is so, it must be on the ground that under such a guarantee the advances are not made in pursuance of a request made once for all by the parties who give the guarantee, but in pursuance of a request supposed to be made by them from time to time as the advances are made, and that if before any particular advance is made the person giving the guarantee informs the person making the advance that he withdraws the guarantee, the advance is not made at his request, and he therefore is not liable for it. It may in such a case be, although I give no opinion upon it, that death and notice of death are sufficient to determine a guarantee as regards subsequent advances. That, however, will have no application to a case where the consideration given by *Lloyd's* committee was given once for all by admitting the son into this association. When that was done there was no power on the part of Mr. *Harper*, who gave the guarantee in consideration of their so admitting the son, to withdraw from the contract he had entered into to be answerable for all engagements entered into by his son as an underwriting member. In my opinion none of the objections can prevail, and this appeal must be dismissed.

LUSH, L.J.:—

The primary and substantial ground of defence put forward here is that the guarantee given by Mr. *Samuel Harper* in consideration of his son being admitted as an underwriting member of *Lloyd's*

expired with his death on notice of the death being communicated to the committee. Now it will be found, I think, that guarantees may, for the purpose of this case, be divided into two classes, the one in which the consideration is entire, and the other in which the consideration is fragmentary, supplied from time to time, and therefore divisible. An instance of the first is where a person enters into a guarantee that in consideration of the lessor granting a lease to a third person he will be answerable for the performance of the covenants. The moment the lease is granted there is nothing more for the lessor to do, and such a guarantee as that of necessity runs on throughout the duration of the lease. The lease was intended to be a guaranteed lease, and it is impossible to say that the guarantor could put an end to the guarantee at his pleasure, or that it could be put an end to by his death contrary to the manifest intention of the parties. Another illustration of it is found in the case upon which Mr. Justice *Fry* relied, of *Calvert* v. *Gordon* (1), which is one of a precisely similar kind. There the defendant, in consideration that the plaintiff would take into his service a given individual as collector and clerk in a responsible position, guaranteed that he would be answerable for his fidelity as long as he continued in that service. It was held, and, as I think, rightly, by the Court of Queen's Bench, that that guarantee could not be put an end to as long as the service continued. The consideration there was admitting the young man into the service of the plaintiff in that capacity, and that being done, it was to be a guaranteed service as long as he remained there. The guarantee therefore necessarily continued until the service ended.

Instances of the second class are more familiar. They are where a guarantee is given to secure the balance of a running account at a bankers, or a balance of a running account for goods supplied. There the consideration is supplied from time to time, and it is reasonable to hold, unless the guarantee stipulates to the contrary, that the guarantor may at any time terminate the guarantee. He remains answerable for all the advances made or all the goods supplied upon his guarantee before the notice to determine it is given; but at any time he may say, "I put a stop to this: I do not intend to be answerable any further, therefore do not make

(1) 3 Man. & Ry. 124.

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any more advances or supply any more goods upon my guarantee." As at present advised, I think it quite competent for a person to do that where, as I have said, the guarantee is for advances to be made or goods to be supplied, and where nothing is said in the guarantee about how long it is to endure. In that case, as at present advised, I cannot entertain a doubt that the judgment of Mr. Justice *Bowen* in *Coulthart* v. *Clementson* (1) is perfectly right, that notice of the death of the guarantor is a notice to terminate the guarantee, and has the same effect as a notice given in the lifetime of the guarantor that he would put an end to it.

Now the question is, to which class does the guarantee in question here belong? Mr. *Harper* was to be admitted an underwriting member at *Lloyd's*. At that time *Lloyd's* was not an incorporated body, but the by-laws then in force made no provision whatever for *Lloyd's* expelling an underwriting member when once admitted, except for some default or crime of his own; there was not a word about guarantee, and the Act which incorporates *Lloyd's* in 1871 itself specifies the contingencies upon which members may be expelled, and every one of them is for some act or default of the underwriting member himself. The Act authorizes the society to admit a member upon any terms they think proper, but it does not authorize them to expel a member when once admitted, except, as I have said, for the specified defaults or misdeeds enumerated in the Act, and the Act expressly says that no by-laws shall be made by the society providing for exclusion from membership of the society in any case. It followed, therefore, that as soon as this young gentleman was admitted he acquired a right to remain an underwriting member until by some act or default of his own he forfeited his right to that position. The withdrawing of the guarantee would not alter his *status;* the association could not turn him out on that ground, and that enables us to put a meaning upon the guarantee. The guarantee says, "I beg to tender my guarantee on his behalf, and to hereby hold myself responsible for all his engagements in that capacity." The association had no power to put an end to the son's position as an underwriting member until he had by some act forfeited his right to that position. Of necessity, therefore, the guarantee must

(1) 5 Q. B. D. 42.

endure as long as he continued an underwriting member, because the manifest intention of the parties was that all his engagements as an underwriter should be guaranteed engagements. Therefore I conclude without a particle of doubt that this was a guarantee which the guarantor himself could not put an end to, and which, consequently, was not put an end to by his death, but that it must endure as long as the *status* of *Robert Henry Harper* as an underwriting member continues.

Then the next question which, no doubt, is a very important and substantial one, is, that *Lloyd's*, having sustained no damage themselves, could not recover for the losses sustained by third parties by reason of the default of *Robert Henry Harper* as an underwriter. That, to my mind, is a startling and an alarming doctrine, and a novelty, because I consider it to be an established rule of law that where a contract is made with *A.* for the benefit of *B.*, *A.* can sue on the contract for the benefit of *B.*, and recover all that *B.* could have recovered if the contract had been made with *B.* himself. The books afford innumerable instances of the application of this doctrine. *Lloyd's* policies, from the time that *Lloyd's* was established, have been always made in the name of the insurance broker on printed forms. The broker insures for the benefit of all whom it may concern, and the broker can bring an action, and is the person to sue and recover according to the interest of the parties. It is true that the person who employed him has a right, if he pleases, to take action himself and sue upon the contract made by the broker for him, for he is a principal party to the contract. If the subject-matter of the policy is sold with the benefit of the policy, the purchaser cannot sue, because he was not a party to the contract, but the assured, the assignor, may in this case sue upon the policy for the benefit of the person to whom he assigned it. That is the doctrine which runs through the whole of our law. I confess I heard the point pressed with something like surprise. I have not the slightest doubt that in this case *Lloyd's* could recover. The very object of making them the parties to the contract was that they should recover for the benefit of all the persons who had sustained losses upon the default of *Robert Henry Harper*.

Then there were other questions which were hardly, I think,

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seriously pressed. It was argued that "all" engagements here did not include engagements as an underwriter, although the words are "all his engagements in that capacity," that is, the capacity of an underwriter, but that the words only meant the obligations which every member incurs, viz., to pay dues and subscriptions to the committee. I do not think that this argument needs any further answer than that which has been given to it in the course of the argument.

There is this one other point as to the right of the corporation of *Lloyd's* to sue. I think what Lord Justice *Cotton* has already said, referring to the terms of the Act of Parliament, is enough to make it to my mind perfectly clear that all the rights of action which at the time the Act passed were vested in *Lloyd's* committee, or in the survivors of those gentlemen who formed the committee when this contract was made, passed over to the body corporate, and that they have a right to bring an action.

I think, therefore, on every ground, the judgment of Mr. Justice *Fry* ought to be affirmed.

Solicitors for Plaintiffs: *Waltons, Bubb, & Walton.*
Solicitor for Defendants: *F. C. Greenfield.*

C. A. 1879 FRY, J. *April* 7, 9. C. A. 1880 *Nov.* 16.

ELLIOTT *v.* DEARSLEY.

[1874 E. 31.]

Mixed Fund—Payment pro ratâ—Exoneration of Mortgaged Estates—17 & 18 *Vict. c.* 113.

A testator, by will made in 1866, after specifically disposing of certain parts of his property and giving certain real estate to his wife during widowhood, gave the rest and residue of his real and personal estate to trustees upon trust to convert the same into money and thereout pay his debts, including debts due on mortgage of the property given to his wife during widowhood, and his funeral and testamentary expenses, and the costs of proving and executing his will. He directed his trustees to pay the income of the fund to his wife during widowhood, and after her death or second marriage he gave so much of the fund as consisted of pure personalty to charitable purposes, and bequeathed the rest of it to his wife. In a subsequent part of his will he appointed executors, and gave a legacy to each of

them who accepted the trusts. At his death part of the residuary real estate was subject to mortgages:—

Held, by *Fry*, J., that the executor's legacies were charged on the real estate, and that as there was a mixed fund they must be paid *pro ratâ* out of the different parts of it.

Held, by the Court of Appeal, that the legacies were charged on the real estate, but only in aid of the personalty, the principle of *pro ratâ* payment only applying to payments which the testator had expressly directed to be made out of the mixed fund.

Held, by the Court of Appeal (affirming the decision of *Fry*, J.), that the will did not indicate any such "contrary intention" as to exclude the mortgages on the residuary real estate from the operation of *Locke King's Act*, and that they must be paid out of the proceeds of the mortgaged estate.

C. E. ELLIOTT, by will dated the 10th of July, 1866, after specifically disposing of various parts of his property, and devising certain real estates to trustees upon trust to allow his wife to receive the rents during her widowhood, gave "the rest and residue" of his real and personal estate to trustees upon trust to sell, collect, or otherwise convert the same into money, and directed that they should stand possessed of the proceeds "upon trust thereout in the first place to pay my debts, including debts due upon mortgage of any of the lands, hereditaments, or other property the enjoyment whereof is hereinbefore secured to my wife during widowhood, also my funeral and testamentary expenses, and the costs and charges of proving and executing this my will, and upon trust to invest the residue of the same moneys" in manner therein mentioned. He then directed his trustees to pay the income of the residuary fund to his wife during her widowhood, and after her decease or second marriage he directed that such part of the fund as might by law be given to charitable purposes should be employed for the charitable purpose therein mentioned, and as to the residue of the fund he bequeathed it to his wife absolutely, subject to the payment of certain life annuities. In a subsequent part of his will he appointed his wife and three gentlemen his executors, and gave to each of the three the sum of £250 if he should accept the trusts.

The testator died in March, 1874. Some of the real estates comprised in the residuary devise were subject to mortgages, and among other questions the points now arose how those mortgage debts and the three legacies of £250 each ought to be borne

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as between the proceeds of the real estate and the personalty, which was all pure personalty.

The case was heard before Mr. Justice *Fry* on the 7th of April, 1879.

Glasse, Q.C., and *S. Dickinson*, for the Plaintiff.

North, Q.C., and *Laing*, for the next of kin.

Bristowe, Q.C., and *Cracknall*, for other parties.

J. Pearson, Q.C., and *Simmonds*, for the husband of the testator's widow.

Rigby, for the Attorney-General:—

As to the mortgages, *Allen* v. *Allen* (1), *Greated* v. *Greated* (2), *Newmarch* v. *Storr* (3), were referred to; and as to the legacies, *Roper* on Legacies (4), *Parker* v. *Fearnley* (5), *Warren* v. *Davies* (6), *Kightley* v. *Kightley* (7), *Roberts* v. *Walker* (8), and *Greville* v. *Brown* (9).

FRY, J.:—

The question I have now to decide arises under the statute usually known by the name of *Locke King's Act*. The testator directed his trustees to stand possessed of the proceeds of sale of two particular estates, and the moneys which should arise from the sale, conversion, and getting in of his residuary real and personal estate, upon trust thereout, in the first place, to pay any debts, including debts due upon mortgage of any of the lands, hereditaments, or other property the enjoyment whereof was thereinbefore secured to his wife during widowhood, and also his funeral and testamentary expenses and the costs of proving and executing his will. Then the trustees were to invest, and after the death or future marriage of the widow, the trusts of the pure

(1) 30 Beav. 395.
(2) 26 Beav. 621.
(3) 9 Ch. D. 12.
(4) Vol. i. p. 631.
(5) 2 S. & S. 592.
(6) 2 My. & K. 49.
(7) 2 Ves. 328.
(8) 1 Russ. & My. 752.
(9) 7 H. L. C. 689.

personalty were separated from those of the impure personalty and the proceeds of real estate. The question then arises whether the persons who claim the proceeds of the real estate are exclusively liable to pay the mortgages which existed upon that residuary real estate, or whether, on the contrary, they are entitled to a contribution from the pure personal estate. That question subdivides itself into two. In the first place, is this provision of the testator within the operation of *Locke King's Act*, and, in the second place, if it be, has he shewn an intention to exclude the operation of that Act? The case appears to be one not covered by authority. No decision having been cited to me which really controls it, I am bound to say the Act appears to me, as it has appeared to other Judges, to be one not very easy of construction. But I find that after the enactment that the heir or devisee of real estate charged with a mortgage shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate, it is further enacted that the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person be primarily liable to the payment of all mortgage debts with which the same shall be charged. In the present case there are two classes of persons both claiming under the testator—a class who claim the proceeds of the mortgaged real estate, and a class who claim the proceeds of the pure personal estate. I think that the words I have read apply, and that of the two classes of persons, who both claim through the testator, those who claim the proceeds of the real estate are liable to pay the mortgage on that real estate.

The next question is, Has the testator shewn a contrary intention? What he has directed is this, that his debts, including mortgage debts on any of the real estates given to his wife during her widowhood, shall be paid out of the common fund. Now, in the first place, I think a direction to pay debts is not a sufficient indication of a contrary intention. It is quite true that this is not a case coming within the precise terms of the amending statute of the 30 & 31 Vict. c. 39, because that only applies to a direction to pay debts out of personal estate, whereas this is a direction to pay them out of a mixed fund. I think, however, that the principle of the Act applies, and that there is no sufficient indication of

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an intention that mortgage debts shall be paid out of the mixed fund.

Then it is said that in this case "debts" must include mortgage debts, because the testator says that debts are to include debts due on the mortgage of the property bequeathed to his wife. I am unable to follow that. The testator says that "debts" are to include mortgage debts of class A, saying nothing about class B. It does not seem to me that you can safely conclude from that that "debts" include mortgages of class B. Therefore I think there is no sufficient indication of a contrary intention, and that *Locke King's Act* must apply. The mortgage debts on parts of the residuary real estate must therefore be paid out of the proceeds of those estates. I will mention the case again as to the legacies to the executors.

April 9, 1879. FRY, J.:—

The question upon which I reserved my judgment was whether or no the legacies given by the testator to his executors are charged upon the real and personal estate. The testator, after making certain specific gifts, gave all the rest and residue of his real and personal estate upon trust to convert and to hold the proceeds upon trusts, which I need not specify beyond saying that they do not in terms apply to the payment of legacies. And in a subsequent part of his will he gave three legacies to his executors. It was argued that the legacies were not charged on the real estate, for that the reason why the gift of "rest and residue" has been held in many cases to charge them was, that "rest and residue" meant whatever remains after giving effect to the previous gifts, and that this reason did not apply where the gift of legacies followed the gift of the "rest and residue." It appears to me that the reason to which I have referred is not the sole ground on which the Court has proceeded in holding that a mixed fund is charged with legacies. In *Greville* v. *Browne* (1) the Lord Chancellor says: "For nearly a century and a half this rule has been laid down, that if there is a general gift of legacies, and then the testator gives the rest and residue of his property real and personal, the legacies are to come out of the realty. It is

(1) 7 H. L. C. 689.

considered that the whole is one mass; that part of that mass is represented by legacies, and that what is afterwards given is given minus what has been before given, and therefore given subject to the prior gift." In other words, the rule seems to be this, that that which in its nature is a charge on part has become a charge or a deduction from the entire mass, and that principle appears to apply whether the legacies are given before or after the gift of the residue. I hold, therefore, that the three legacies are charges on the real and personal estate *pro ratâ*.

The order on further consideration accordingly declared that, according to the true construction of the will, such parts of the testator's real estate as were subject to mortgages passed to the devisees thereof respectively, subject to the mortgages affecting the same respectively, and that the said mortgages ought not to be paid off out of, nor the said real estates exonerated by, the testator's personal estate, and that the debts of the testator, other than mortgage debts, and his funeral and testamentary expenses, and the costs and charges of proving and executing his will, and the three legacies of £250 each, ought to be paid rateably out of the proceeds of sale of the residuary real and personal estate.

The husband of the widow appealed from the above declarations. The appeal was heard on the 16th of November, 1880. C. A.

Simmonds, for the Appellant:—

I submit that *Locke King's Act* does not apply where real and personal estate are directed to be converted and the proceeds are made a mixed fund. *Newman* v. *Wilson* (1) proceeds on this principle, as appears from comparing it with *Rowson* v. *Harrison* (2). If, however, the Court is against me on that, I say that the direction to pay debts out of the mixed fund takes the case out of the Act. It was held under the original Act that a direction to pay debts out of the personal estate took a case out of the Act: *Eno* v. *Tatham* (3). Then came the amending statute 30 & 31 Vict. c. 69, which enacted that a direction to pay debts out of

(1) 31 Beav. 33. (2) 31 Beav. 207.
(3) 3 D. J. & S. 443.

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personalty should not be taken to indicate a contrary intention. This does not say anything as to the effect of a direction to pay debts out of a mixed fund, and the later statute, 40 & 41 Vict. c. 34, which provides that such a direction shall not indicate a contrary intention, amounts to a legislative declaration that the clause in 30 & 31 Vict. c. 69 did not apply to it. The present will comes under the first amending Act, and I contend that the mortgage debts must be borne rateably by the different parts of the mixed fund. As to the legacies, Mr. Justice *Fry* relied on *Greville* v. *Browne* (1); but that case did not decide that because the gift of residue made the legacies chargeable on the real estate, they were therefore to be borne by the real and personal estate rateably, and *Blann* v. *Bell* (2) shews that such is not the rule. Mr. Justice *Fry* appears to have combined the doctrine of *Greville* v. *Browne* with *Roberts* v. *Walker* (3); but I submit that *Roberts* v. *Walker* has no application to anything not directed to be paid out of the mixed fund.

Rigby, for the Attorney-General:—

Even before the Act 30 & 31 Vict. c. 69, there would be nothing here to shew a contrary intention, so as to exclude the case from *Locke King's Act*. No doubt there is a direction as to debts, and under the first Act "debts" was held to include mortgage debts; but here there is a direction to pay debts, including mortgage debts on certain specified estates; and the rule *expressio unius est exclusio alterius* applies. Then as to the mode of paying the legacies, they were charged on the real estate, the word "residue" having that effect, though there are other devises of realty: *Francis* v. *Clemow* (4); and the realty and personalty being made a mixed fund, the sums payable out of them ought to be paid rateably: *Allan* v. *Gott* (5).

Simmonds, in reply, as to the mortgages.

JAMES, L.J.:—

As regards the legacies, I cannot follow Mr. *Rigby's* argument

(1) 7 H. L. C. 689
(2) 5 De G. & Sm. 658, 665.
(3) 1 Russ. & My. 752.
(4) Kay, 435.
(5) Law Rep. 7 Ch. 439.

that whenever real and personal estate are thrown together into a mixed fund, everything payable out of them is to be thrown upon them rateably. I remember that *Roberts* v. *Walker* (1) was considered at the time to go beyond any case that had previously been decided; but that case went no further than this, that where a testator made a mixed fund, out of which he directed certain things to be paid, then to the extent of the things so mentioned the payment was to be made rateably out of the different parts of the fund. If the testator had only directed legacies to be paid out of the fund they must be paid rateably, but that would not make debts be payable rateably out of the realty and personalty; the rule of rateable payment does not extend beyond the things which the testator has expressly directed to be paid out of the fund. Here the legacies are no doubt charged on the real estate by force of the word "residue," but there is no direction to pay them out of the mixed fund. There is therefore nothing to disturb the ordinary rule that they are primarily payable out of the personal estate. In this respect therefore the order appealed from must be varied.

As regards the mortgage debts, I am of opinion that the decision of Mr. Justice *Fry* was right. The meaning of the Act 17 & 18 Vict. c. 113, c. 1, was, that, as between the persons interested in the real and personal estate of a testator, mortgage debts should be borne by the mortgaged estates, which is what a testator generally would say if he could be asked, and the Act provides that the mortgaged estates shall, as between the different persons claiming under the testator, be primarily liable to the payment of the mortgage debts unless the testator has signified a contrary intention. It was decided in *Eno* v. *Tatham* (2) that a direction for payment of the testator's debts out of his personal estate indicated a contrary intention. But here the testator makes a mixed fund, and directs payment out of it of his debts, including mortgage debts on certain estates which were not to be immediately sold, but not mentioning the mortgages on the residuary estates which were to be sold at once. The reasonable view of his intention is that he considered that the mortgages on the estates which were to be immediately sold would be paid out of

(1) 1 Russ. & My. 752. (2) 3 D. J. & S. 443.

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the proceeds of the sale of those estates, and that the net proceeds only would go into the mixed fund out of which the estates that were not to be sold at once would be exonerated. The will does not shew any intention to exclude the operation of the Act as to the mortgage debts with reference to which nothing is said.

COTTON and LUSH, L.JJ., concurred.

Solicitors: *W. H. Oliver; Dubois & Reid; Withall & Compton; Hare & Fell; F. C. Greenfield; Wyatt, Hoskins, & Hooker.*

C. A. 1880 C. J. B. *Feb.* 25. C. A. *June* 24; *Dec.* 9.

Ex parte NEWTON.
Ex parte GRIFFIN.
In re BUNYARD.

Proof in Bankruptcy—Bill of Exchange—Accommodation Bill deposited as Security for less than its nominal Amount.

When a bill of exchange, accepted for the accommodation of the drawer, is deposited by him as security for a debt less than the amount of the bill, the holder is entitled to prove in the bankruptcy of the acceptor for the full amount of the bill, though he cannot receive dividends in excess of the debt due to him by the drawer.

Decision of *Bacon*, C.J., reversed.

IN November, 1878, *Harry Bunyard*, a sack manufacturer, in *Tooley Street, Southwark*, entered into a contract with *Alfred Newton* to sell to him 5000 sacks, at the price of £272 16*s.* 8*d.*, the sacks to be delivered as *Newton* should require them. A four months' bill of exchange for £272 16*s.* 8*d.* was drawn by *Bunyard* upon and accepted by *Newton*, and was afterwards indorsed by *Bunyard* to the *London and County Bank*. As a security for the performance of the contract by *Bunyard*, he indorsed to *Newton* a bill of exchange for £300, dated the 12th of November, 1878, drawn by *H. Bunyard* and accepted by a firm of *Thos. Bunyard & Sons*, of *Maidstone*, and payable four months after date. This bill had been accepted by *Bunyard & Sons* for the accommodation of *H. Bunyard*, though *Newton* was ignorant of this fact. It was expressly agreed between *H. Bunyard* and *Newton* that the £300 bill was not to be negotiated until *H. Bunyard* failed to fulfil

his contract. Sacks to the value of £32 10*s.* were delivered to *Newton* by *H. Bunyard*, but he failed to deliver any more. *Newton* did not negotiate the £300 bill. In January, 1879, *Newton* filed a liquidation petition in the *London* Bankruptcy Court, and his creditors resolved to accept a composition. The *London and County Bank* received the composition in respect of the bill for £272 16*s.* 8*d.* Before the bill for £300 matured *T. Bunyard & Sons* had filed a liquidation petition in the *Maidstone* County Court. *Newton* tendered a proof in the liquidation upon the £300 bill for its full amount. The Registrar, acting as Judge, held that the proof could be admitted only for the sum of £240 6*s.* 8*d.*, the amount which remained due from *H. Bunyard* to *Newton* under the contract.

Newton appealed to the Chief Judge.

The appeal was heard on the 25th of February, 1880.

An appeal of a similar nature by a person named *Griffin*, with whom other accommodation bills accepted by the debtors had been deposited as a security for an advance less than the amount of the bills, was heard at the same time.

E. Cooper Willis, for the Appellant *Newton*, referred to *Ex parte Phillips* (1).

Boxall, for the trustee, referred to *Reid* v. *Furnivall* (2); *Attenborough* v. *Clarke* (3); *Atwood* v. *Crowdie* (4).

E. Cooper Willis, in reply.

BACON, C.J.:—

I think the Appellant has got as good an order as he deserves. There was no commercial transaction in respect of which these bankrupts are liable to the Appellant beyond the £32 10*s.* The bill was indorsed over to *Newton* only for the purpose of depositing it by way of security. If a man is a creditor of a bankrupt and holds security for more than his debt, he cannot prove for more than is justly due to him. This view is rather lenient than otherwise in favour of the present Appellant. If he

(1) 1 M. D. & D. 232.
(2) 1 C. & M. 538.
(3) 27 L. J. (Ex.) 138.
(4) 1 Stark. Rep. 483.

C. A. 1880 *Ex parte* NEWTON. *Ex parte* GRIFFIN. *In re* BUNYARD.

had sued and recovered on the bill he would have held the surplus beyond what was due to him by the drawer in trust for the drawee. The Court is asked to let him prove for the whole amount of the bill.

There is no ground for the appeal. The creditor ought to have been content, and even thankful, for the order that was made. The appeal is perfectly groundless, and must be dismissed with costs.

Finlay Knight, for the Appellant *Griffin*, referred to *Cooke's* Bankrupt Laws (1), citing *Ex parte King*; *Ex parte Crossley* (2); *Ex parte Schofield* (3).

Boxall, for the trustee.

BACON, C.J.:—

It is not necessary to go into the question of whether these were accommodation bills or not, as to which there were contradictory statements on the part of the debtor and creditor.

The matter I have to deal with is this. The story is: A man owes me, say £200. There being this relation of debtor and creditor subsisting between us, the debtor brings me bills of exchange, and deposits them with me as a security for that sum. He then becomes bankrupt, and I make a claim against his estate for what is due. How can I say that proof can be made against his estate for any other sum than the £200?

Then he puts into the schedule of his assets the amount that is due on these bills, because he does not wish to forego any remedy he may have against a third person. He might put any amount of these bills into the schedule, though he could not recover more than twenty shillings in the pound upon the amount actually due to him.

But the creditor cannot prove for more than the debt actually due to him.

C. A. From this decision *Newton* and *Griffin* appealed. The appeals were heard on the 24th of June, 1880.

(1) 8th Ed. p. 176. (2) 3 Bro. C. C. 237.
(3) 12 Ch. D. 337.

E. Cooper Willis, for the Appellant *Newton*:—

I admit that I cannot receive dividends beyond the amount due to me from *H. Bunyard*. But I am entitled to prove for the full amount of the bill. This was settled long ago in *Ex parte Bloxham* (1); *Robson's* Bankruptcy (2).

De Gex, Q.C., and *Kingsford*, for the trustee:—

A proof in bankruptcy is limited to the amount which could have been recovered against the bankrupt in an action if he had remained solvent. If a bill which is accepted for value is deposited by the drawer as security for a debt less than the amount of the bill, the holder can recover the full amount from the acceptor; but if an accommodation bill is deposited in the same way the holder cannot recover from the acceptor more than he has himself advanced. In *In re Gomersall* (3) Lord Justice *Mellish* said (4), referring to some cases cited in *Cooke's* Bankrupt Law (5), "In those cases it was held that if the bill was for value as between the drawer and the acceptor, the holder, having advanced money on the bill, might prove against the acceptor for the full amount, and take dividends until he had received the sum he had advanced, that is to say, until he had received the sum which he could have recovered in an action against the drawer. But I rather think it was held that when they were accommodation bills he could not do that, because in the case of an accommodation bill you cannot sue the acceptor for any larger sum than you can sue the drawer for." It does not appear that in *Ex parte Bloxham* the bills deposited were accommodation bills. Lord *Eldon* says (6): "You may have the paper of third persons, those persons being indebted to your debtor in more, and you may prove to the whole amount, not exceeding 20*s.* in the pound upon the original debt."

[COTTON, L.J.:—Do you say that a transfer of an accommodation bill is a transfer only of what is due by the acceptor to the drawer? That is nothing at all.]

Of course the acceptor is a surety as to third persons who give

(1) 5 Ves. 448; 6 Ves. 449, 600.
(2) 3rd Ed. p. 222.
(3) 1 Ch. D. 137.
(4) 1 Ch. D. 142.
(5) 8th Ed. p. 176
(6) 6 Ves. 450.

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value for the bill, for he allows it to go into the world with his name on it. But his suretyship extends only to the amount which is given for it. The *dictum* of Lord Justice *Mellish* is supported by *Jones* v. *Hibbert* (1).

[THESIGER, L.J.:—In that case the acceptor was not bankrupt, and it is an authority that the holder for value of an accommodation bill can recover from the acceptor the amount which he has advanced on the security of the bill.]

Therefore the holder can prove in the bankruptcy of the acceptor for that amount only. The fundamental rule is that you cannot prove in bankruptcy for more than you could sue the bankrupt for if he was solvent. Proof is a substitute for the right of action. The cases cited by *Cooke* do not support his view of the law. Many cases at law shew that the holder of an accommodation bill can recover only what is due to him by the person from whom he receives it: *Simpson* v. *Clarke* (2); *Chitty* on Bills (3); *Wiffen* v. *Roberts* (4); *Heath* v. *Sansom* (5); *Smith* v. *Knox* (6); *Fentum* v. *Pocock* (7); *Jones* v. *Hibbert*.

[They also referred to *Ex parte Earle* (8).]

E. Cooper Willis, in reply:—

The authorities cited do not support the proposition of the Respondent. In *Wiffen* v. *Roberts* the express ground of the decision was that the holder of the bill knew that it was an accommodation bill. In the present case the Appellant had no notice that the bill was an accommodation one. *Cooke* lays it down clearly that the proof may be for the full amount of the bill. The same thing is said in *Byles* on Bills (9), and he cites other cases in support of it.

[*De Gex*, Q.C.:—Those are cases of discounted bills.]

Ex parte Bloxham (10) is directly in point.

[*De Gex*, Q.C.:—The statement of facts in the report of that

(1) 2 Stark. Rep. 304.
(2) 2 C. M. & R. 342.
(3) 11th Ed. p. 55.
(4) 1 Esp. 261.
(5) 2 B. & Ad. 291.
(6) 3 Esp. 46.
(7) 5 Taunt. 192.
(8) 5 Ves. 833.
(9) 12th Ed. p. 452.
(10) 6 Ves. 600.

case (1) does not shew that the bill was an accommodation one, and the original decision of Lord *Rosslyn* was reversed by Lord *Eldon* (2), on the authority of *Ex parte Bloxham* (3), in which the bills were clearly not accommodation bills.]

Ex parte Phillips (4) is in our favour. If the argument of the trustee is correct, a bill for £300 is no greater security than a bill for £200. The supposed rule that proof in bankruptcy is merely coextensive with the right of action at law is not so well established as it is said to be. The right of a third party who does not know that the bill is an accommodation one can only be satisfied by the payment of 20*s.* in the pound. In *In re Gomersall* (5) this was admitted. Whatever may be the rights of the drawer and the acceptor of an accommodation bill *inter se*, that cannot affect the rights of a third party against either of them.

[THESIGER, L.J.:—Is that so? Is not the rule that the holder of such a bill can only sue the acceptor for the amount which he himself has advanced inconsistent with your proposition?]

Finlay Knight, for the Appellant *Griffin*, referred also to *Ex parte Schofield* (6).

De Gex, Q.C., and *Kingsford*, for the trustee:—

In *Ex parte Phillips* the bills were not accommodation bills.

The appeals were argued before *Baggallay*, *Cotton*, and *Thesiger*, L.JJ. *Thesiger*, L.J., died before the judgment of the Court had been delivered, and the parties then agreed to accept the judgment of the surviving members of the Court.

Dec. 9. COTTON, L.J.:—

I have now to deliver the judgment of Lord Justice *Baggallay* and myself, in which I believe the late Lord Justice *Thesiger* would have agreed.

Each of these appeals raised the same question, namely, whether

(1) 5 Ves. 448.
(2) 6 Ves. 600.
(3) 6 Ves. 449.
(4) 1 M. D. & D. 232.
(5) 1 Ch. D. 137.
(6) 12 Ch. D. 337, 348.

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the holder of a bill of exchange taken from the drawer as security for a sum less than the amount of the bill is entitled, as against the estate of the bankrupt, who had accepted it for the accommodation of the drawer, to prove only for the amount due to him (the holder) or for the amount of the bill, with a restriction that he shall not receive dividends on his proof to an amount exceeding the sum due to him on his security. It was conceded that, if the bill had been accepted for value, the holder would have been entitled to prove for the larger amount. But it was urged on behalf of the Respondent that the fact of the acceptance being for the accommodation of the drawer makes a difference. It was said, and truly, that a man who has taken a bill from the drawer as security only will hold for the drawer any sum recovered from the acceptor beyond the amount due on his security, and that when the bill has been accepted for the accommodation of the drawer, he, the drawer, would be liable to repay to the acceptor any part of the sum recovered from him, which may be handed to the drawer by the holder of the bill. But the acceptor has put it in the power of the drawer to make the bill in the hands of a holder for value available against the acceptor for its full amount, and, although the holder may have taken it as security for a sum less than the amount of the bill, we are of opinion that such a holder is entitled to make the bill available against the acceptor in the way which will best produce the sum due to him, and that, in the event of bankruptcy, he is entitled to prove against the acceptor's estate for the full amount of the bill. It was argued that, if the acceptor had not become bankrupt, judgment in an action against him on the bill would be confined to the amount due on the security thereof from the drawer. But, if the acceptor is solvent, a judgment against him will realize the full amount for which it is obtained, and, even if he is not solvent, the amount to be recovered on the judgment will (to an amount not exceeding the sum for which the judgment is recovered) be limited only by the value of his estate which can be realized under the judgment. In case this is insufficient to pay the debt to the holder of the bill, the amount which he will recover will not be increased by giving him judgment for a larger sum. It was, however, contended that there is authority in favour of the Respondent, and *Ex parte*

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Bloxham (1) was referred to. The decision of Lord *Rosslyn* there reported is in favour of the more limited proof. But the order was afterwards (2) discharged, and an order made giving the bill-holder a right to prove for the full amount of the bill. This case, even if it is not (as we think it is) an authority in favour of the Appellants cannot be regarded as an authority against them. We are of opinion, therefore, that the Appellants are entitled to prove for the full amount of the bills, with a restriction that they are not to receive dividends beyond the amounts due to them.

Solicitors for Appellant *Newton: Morley & Shirreff.*
Solicitors for Appellant *Griffin: Williamson, Hill, & Co.*
Solicitors for Trustee: *Hughes, Hooker, & Co.*, agents for *Hughes & King, Maidstone.*

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Company—Winding-up — Execution Creditor—Judicature Act, 1875, *s.* 10—*Bankruptcy Act*, 1869, *s.* 87—*Companies Act*, 1862, *ss.* 85, 87.

A creditor having recovered judgment against a company, the sheriff, on the 10th of July, 1880, seized the goods of the company under a *fi. fa.* for £89. On the 14th of July a winding-up petition was presented, and on the 15th of July an order was made restraining all further proceedings in the action until the petition was disposed of or withdrawn. The sheriff thereupon withdrew from possession. On the 30th of July a winding-up order was made. On the 31st of July the creditor applied for leave to enforce his judgment, and the value of the goods seized being much greater than the amount of the debt, an order was made by *Malins*, V.C., that the liquidator should pay the amount of the debt:—

Held, on appeal, that this order was right.

Sect. 87 of the *Bankruptcy Act*, 1869, which deprives execution creditors of the fruits of the execution where the sheriff has notice of a bankruptcy within fourteen days after sale, is not made applicable to the winding-up of companies by the *Judicature Act*, 1875, s. 10.

In re Richards & Co. (3) approved.

In re Printing and Numerical Registering Company (4) overruled.

ON the 10th of July, 1880, the sheriff of *Yorkshire* seized the goods, machinery, and effects of the company under a writ of

(1) 5 Ves. 448.
(2) 6 Ves. 600.
(3) 11 Ch. D. 676.
(4) 8 Ch. D. 535.

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fi. fa. issued to recover £89 8*s.* 9*d.*, for debt and costs under a judgment, dated the 3rd of June, 1880, obtained against the company by *W. P. Burkinshaw*, the liquidator of the *Union Bank of Hull.*

On the 14th of July, 1880, a winding-up petition was presented.

The sheriff not yet having sold, an order in the action was obtained on the 15th of July, staying all proceedings in the action till the petition was disposed of or withdrawn. The sheriff accordingly withdrew from possession.

On the 30th of July a winding-up order was made by Vice-Chancellor *Malins.*

On the 31st of July *Burkinshaw* took out a summons in the winding-up, asking that notwithstanding the winding-up and the restraining order, he might be at liberty to proceed to enforce his judgment, and the sheriff might be at liberty to resume possession of the chattels taken in execution.

On the 5th of August the Chief Clerk of Vice-Chancellor *Malins* made an order on the summons, expressing the opinion that the applicant was entitled to the same charge on the assets of the company in the hands of the liquidator as if they had been sold by the sheriff under the *fi. fa.*, and ordering that the official liquidator should, out of the first assets that should come to his hands, pay to the applicant the £89 8*s.* 9*d.* with interest at £4 per cent. from the 3rd of June, 1880, till payment.

The liquidator gave notice of motion to discharge this order, and on the 4th of November, 1880, Vice-Chancellor *Malins*, without expressing any opinion of his own on the merits, stated that, there being a direct conflict of authority on the point, and the case of the judgment creditor being supported by the most recent authority, and by several other cases, he thought it best to refuse the motion.

The liquidator appealed. The appeal was heard on the 11th of December, 1880.

Glasse, Q.C., and *Boome*, for the Appellant:—

The question is whether the *Judicature Act*, 1875, s. 10, does not import sect. 87 of the *Bankruptcy Act*, 1869, so as to defeat the security of the execution creditor.

[JAMES, L.J.:—It is to be observed that sect. 87 only applies in the case of a trader debtor?

LUSH, L.J.:—Can you say that an execution creditor is a secured creditor if the clause takes away his security?]

That point is decided by *Ex parte Rayner* (1) and *Ex parte Abbott* (2).

[Counsel for the Respondents admitted the cases to establish that the execution creditor was to be treated as a secured creditor.]

The Master of the Rolls, in *In re Printing and Numerical Registering Company* (3), held that sect. 10 imported the 87th section of the *Bankruptcy Act* into winding-up, so as to defeat the right of the execution creditor. Mr. Justice *Fry* came to an opposite conclusion in *In re Richards & Co.* (4), but in that case the judgment creditor had been induced to refrain from issuing execution by the request of the company.

[COTTON, L.J.:—Has it ever been held that a creditor's rights in bankruptcy are altered by the fact that his delay to take proceedings was occasioned by the request of the debtor?]

We cannot say that it has, and Mr. Justice *Fry* did not rely on any such principle; his decision is in direct conflict with that of the Master of the Rolls, who, as we contend, has only given due effect to the natural meaning of the language of sect. 10, which is that the rights of creditors holding security are to be determined according to the rules in bankruptcy.

[COTTON, L.J.:—Your construction makes the *Judicature Act* repeal by implication, and in a very indirect way, the specific provisions in the 85th and 87th sections of the *Companies Act*, 1862.

JAMES, L.J.:—There was a well-known difference in the rules of Chancery and Bankruptcy as to proof by secured creditors. In Chancery a secured creditor could prove for his whole debt, in bankruptcy he must realize or put a value on his security, and prove only for the surplus. Was it intended to do more by

(1) Law Rep. 7 Ch. 325.
(2) 15 Ch. D. 447.
(3) 8 Ch. D. 535.
(4) 11 Ch. D. 676.

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sect. 10 than to substitute the bankruptcy rule for the Chancery rule in this respect?]

The language of the section is much wider than it would have been if nothing more than that had been intended. The general policy of the section was to promote an equal division of the assets among the creditors. *Lee* v. *Nuttall* (1) was cited against us, but has really no bearing on the case. The authorities referred to by Mr. Justice *Fry* do not distinctly raise the question, except *Ex parte Railway Steel and Plant Company* (2), and there the Vice-Chancellor gives no reason for his decision.

COTTON, L.J.:—The interlocutory observation on page 188 appears to shew the ground of the decision.

Macnaghten, Q.C., and *Nalder*, appeared for *Burkinshaw*, but at the conclusion of the argument for the Appellant the Court rose.

Dec. 13. JAMES, L.J.:—

Since the Court rose on Saturday I have considered this case, and see no reason to differ from the decision of the Vice-Chancellor, who followed the opinion of Mr. Justice *Fry* in *In re Richards & Co.* (3), dissenting from that of the Master of the Rolls in *In re Printing and Numerical Registering Company* (4). It appears to me, with deference to the Master of the Rolls, that there is a fallacy in his argument. The 10th section of the *Judicature Act*, 1875, enacts that in the administration by the Court of the assets of a deceased person whose estate is insolvent, and in the winding-up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt. The Master of the Rolls thinks that this enactment

(1) 12 Ch. D. 61.
(2) 8 Ch. D. 183.
(3) 11 Ch. D. 676.
(4) 8 Ch D. 535.

involves the proposition that, whereas under certain circumstances a security is avoided in bankruptcy, therefore, in the administration of the assets of a deceased person and in the winding-up of a company, a security is to be avoided under similar circumstances. There are, to my mind, no words in the section which, expressly or by implication, lead to that result. The question is not as to the administration of a fund, but what is the fund to be administered. I see no reason why a person relying on his security in the administration of the assets of a deceased person or in the winding-up of a company, should be deprived of it, because under similar circumstances he would be deprived of it in bankruptcy. I am of opinion that the section no more imports that law into administration of the assets of a deceased person or winding-up of companies, than it imports the law as to fraudulent preference or as to reputed ownership. I do not see any obscurity in the section. The Legislature, finding a well-known difference in the law as to proof by a secured creditor in administration by the Court of Chancery and in bankruptcy, intended to introduce the bankruptcy rule that a secured creditor could only prove for the balance of his debt after deducting the value of his security.

COTTON, L.J.:—

I am of the same opinion. The case, no doubt, is one of importance, and is made more important by the difference of judicial opinion upon it. The question is what is the true construction of the 10th section of the *Judicature Act*, 1875. That section enacts that, in the administration of the assets of a deceased person or of an insolvent company, "the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities proveable as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." What is proposed to be done in the present case is not to apply a particular rule to the administration of the assets of the company, but to bring into the assets something which, apart from this section, would not be assets, because it has been seized by a creditor under such circumstances that he can hold it as a security for his debt. Now what is the true construction of the section? We must see what the

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law was at the time. It was established by *Mason* v. *Bogg* (1) that in the administration of the assets of a deceased person a secured creditor who had not realized his security could prove for and receive dividends on the whole amount of his debt, and afterwards realize his security, subject only to this, that he could not retain more than 20*s.* in the pound in the whole, and the same rule prevailed in the winding-up of a company, whereas in bankruptcy a secured creditor could only prove for the balance of his debt after realizing or deducting the value of his security. Here was a plain case to be dealt with. Now let us see what the rule was as to a judgment creditor in the winding-up of a company. Under sects. 85 and 87 of the *Companies Act*, 1862, the Court had a discretion whether or not it would allow a judgment creditor who had not proceeded to a sale before the commencement of the winding-up to go on with his proceedings. If the 10th section of the *Judicature Act*, 1875, is to have the wide sense which has been attributed to it, it takes away that discretionary power by words not directly applicable to the subject, and has the effect not only of altering the disposition of the assets, but of varying the answer to the question what those assets are. The 87th section of the *Bankruptcy Act*, 1869, which it is proposed to import under the terms of sect. 10, comes under the heading "As to property devolving on trustee," and both sect. 87 and the subsequent sections down to sect. 93 relate to bringing in property which but for those enactments would not be liable to be administered in bankruptcy, and we cannot properly give to sect. 10 of the *Judicature Act*, 1875, the effect of importing such enactments.

LUSH, L.J.:—

I am of opinion that the 87th section of the *Bankruptcy Act* is not imported by sect. 10 of the *Judicature Act*, 1875, into administration by the Court of the assets of deceased persons or into winding-up proceedings. The 87th section defeats an execution against a trader if it has been executed within a certain time before a petition is presented on which he is adjudged bankrupt. There is no such provision in the Companies Acts. The winding-up petition stops the creditor's proceedings, but the

(1) 2 My. & Cr. 443.

Act gives the Court power to allow him to proceed, and there are cases in which he has been allowed to do so. The 87th section therefore was not applicable to a case of winding-up, and I think that the 10th section of the *Judicature Act*, 1875, does not make it applicable. The object of the 10th section was, in my opinion, this. Before that enactment a creditor who had not realized his security could prove against the assets of his deceased debtor for the whole debt, and receive a dividend. He could then realize his security, and if he received in the whole more than 20*s.* in the pound he paid over the excess. The same rule prevailed in the winding-up of a company. In bankruptcy the rule was different. The creditor could only prove for the balance of his debt after deducting the value of his security. The whole object of sect. 10, as it appears to me, was to make this rule in bankruptcy applicable to administration of the assets of deceased persons, and to winding-up. Here the claimant does not make any claim against the assets, he only claims the benefit of his security, which, under the provisions of the *Companies Act*, 1862, the Court has power to give him. I am therefore of opinion that the decision appealed from ought to be upheld.

Solicitors: *Weed & White; Collyer-Bristow, Withers, & Russell.*

M. R.
1880
Nov. 10.

DENT *v.* LONDON TRAMWAYS COMPANY.

[1879 D. 85.]

Limited Company—Tramway Company—Maintenance of Works—Depreciation of Capital—Reinstating Capital—Reserve Fund—Ordinary Shareholders—Preference Shareholders—Dividend—Payment out of Capital—"Net Profits"—Profits of particular Year.

The articles of association of a limited tramway company provided that no dividend should be declared except "out of profits"; that the directors should, with the sanction of the company, declare annual dividends "out of profits"; and that the directors should, before recommending a dividend, set aside "out of profits," subject to the sanction of the company, "a reserve fund for maintenance, repairs, depreciation, and renewals." The company had for several years carried on their business, paying a dividend half-yearly on their ordinary shares; but they failed to set apart a reserve fund adequate for the maintenance of their tramway, which eventually became worn out. The company having again declared a half-yearly dividend on their ordinary shares, and the total sum appropriated for the dividend being, as it appeared, much less than the sum required to reinstate the tramway:—

Held, that the company could only declare a dividend out of the net profits, and that the net profits could not be ascertained without first restoring the tramway to an efficient condition, or making due provision for that purpose out of the company's assets. An injunction was accordingly granted restraining the company from paying the half-yearly dividend they had declared, but leave was given them to move to dissolve the injunction, in the event of their being able to satisfy the Court that there were profits available for the dividend:

Held, however, that the holders of preference shares, the dividend on which was "dependent upon the profits of the particular year only," were entitled to a dividend out of the profits of any year after setting aside a proportionate amount sufficient for the maintenance of the tramway for that year only; and were not to be deprived of that dividend in order to make good the sums which in previous years should have been set aside by the company for maintenance, but which had been improperly applied by them in paying dividends.

THE Defendants, the *London Tramways Company, Limited*, were incorporated in 1870, under the *Companies Acts*, 1862 and 1867, with a capital of £250,000, in 25,000 shares of £10 each. The whole of the capital had been issued and was fully paid up.

In 1874, in pursuance of a power contained in their articles of association, the company passed a special resolution increasing

their capital "by the issue of 8000 shares of £10 each, bearing a preferential dividend of 6 per cent. per annum over the present shares of the company dependent upon the profits of the particular year only."

In accordance with that resolution 8000 preference shares of £10 each were duly issued and became fully paid up. The Plaintiff was the registered holder of 100 of such shares.

The Plaintiff, who sued on behalf of himself and all other the preference shareholders of the company, alleged in his statement of claim that in the half year ending the 30th of June, 1878, the company earned profits sufficient for the payment of a dividend at the rate of 3 per cent. per annum both on the preference and ordinary shares, which dividend was accordingly duly paid; that in the half year ending the 31st of December, 1878, the company earned further profits sufficient for payment of a dividend at the rate of 3 per cent. upon the preference shares, and at the rate of 6 per cent. per annum on the ordinary shares, and that by a resolution passed at a general meeting of the company, held on the 20th of February, 1879, such dividend was duly declared and became payable to the Plaintiff and other holders of preference shares; that the company however refused to pay such dividend to the Plaintiff or any of the other holders of preference shares, and that the sum of £30 was now due to the Plaintiff in respect of such dividend on the 100 preference shares; that during the year ending the 31st of December, 1879, the company earned profits much more than sufficient for payment of a dividend at the rate of 6 per cent. per annum upon the preference shares, but that the company had not paid and refused to pay, either to the Plaintiff or to any other holders of preference shares, any dividend whatever for that year; that the company's tramways and works were in a state of efficiency and good working order, and that no expenditure beyond the expense occasioned by ordinary wear and tear was required.

The Plaintiff claimed (amongst other things) a declaration that he and all the other preference shareholders were entitled to a dividend on their shares at the rate of 3 per cent. per annum for the year ending the 31st of December, 1878, and a dividend on their shares at the rate of 6 per cent. per annum for the year

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ending the 31st of December, 1879; payment to the Plaintiff of the sums of £30 and £60, being the amounts due to him in respect of such dividend for the years ending the 31st of December, 1878, and the 31st of December, 1879, respectively; an account of the profits made by the company during the same years respectively, and payment to the Plaintiff of such dividend on his preference shares as upon taking such account the Court should consider him entitled to.

In their statement of defence the company alleged that they had only recently ascertained that from the year 1871 down to the end of the year 1878 their accounts, which were rendered half yearly, had been kept in an improper and misleading manner, no proper or sufficient sums ever having been expended and proper allowance made for the maintenance, repairs, depreciation, and renewals of the tramways, rolling-stock, and other property of the company, and that the amounts from time to time actually charged against revenue in respect of such maintenance, repairs, depreciation, and renewals were grossly inadequate, and far below what ought properly to have been so charged.

The defence then proceeded to state that from the year 1871 to the year 1877 inclusive, the company had, in ignorance of their true financial position, paid large sums to the shareholders by way of dividend, without charging, as they should have done, in each year a proper proportional amount against revenue for maintenance, repairs, depreciation, and renewals; and it appeared that if this proportional yearly charge had been made the balance of revenue or "net profit" in each year available for a dividend would have been comparatively small.

The defence then stated that the company's accounts for the year 1878 purported to shew a net balance of profits for that year of £21,178 10*s.* 10*d.*; but that (paragraph 20) "if a proportionate amount had been charged against the revenue for the year 1878 for such maintenance, repairs, depreciation, and renewals as aforesaid, the accounts would have shewn, as the fact was, that there was a balance of revenue, and in that sense a net profit in that year, of only £14,932": that on the faith of the said accounts, and being ignorant of their true financial position, the company paid the dividend for the half year ending the 30th of June, 1878, both

on the preference and ordinary shares, and on the 20th of February, 1879, passed a resolution declaring the further dividend for the half year ending the 31st of December, 1878, on both the preference and ordinary shares.

Shortly after the passing of the last-mentioned resolution, and before any dividend was paid under it, one *William Davison*, on behalf of himself and all other the shareholders of the company, brought an action—*Davison* v. *Gillies*—which, as amended, was against the directors of the company and the company itself, for (amongst other things) an injunction to restrain the defendants in that action from applying any part of the assets of the company which represented capital, or ought to be retained to represent capital, in the payment of dividends, and from submitting to the shareholders of the company any resolution to confirm or permit the payment of dividends out of capital: and upon motion (1)

(1) 1879. M.R. Mar. 14.

DAVISON *v.* GILLIES.

[1879 D. 44.]

THIS was a motion by the Plaintiff *William Davison*, suing on behalf of himself and all other shareholders of the *London Tramways Company, Limited*, and the company, for an injunction to restrain the Defendants, the directors of the company, from applying any part of the assets of the company which represented capital, or ought to be retained to represent capital, in the payment of dividends on the shares in the company, and from submitting to the shareholders any resolution to confirm or permit the payment of dividends out of capital, or summoning any meeting for the purpose of authorizing payment of dividends, without first fully and properly disclosing to all the members of the company the true state of the capital and other accounts of the company, and without disclosing the fact that no dividends could be paid except out of assets which ought to be retained to represent capital.

The ground of the motion was that the company's tramways had become worn out, thus necessitating a large expenditure for repairs, no due provision for which had been made by the company in their accounts; and that consequently the company had no right to pay the dividend declared on the 20th of February, 1879, as mentioned in an action of *Dent* v. *London Tramways Company, Limited*, until these repairs had been provided for; or, in other words, until the capital so lost had been reinstated. The other facts of the case sufficiently appear from his Lordship's judgment.

By amendment the company were struck out as Plaintiffs and added as Defendants.

Chitty, Q.C., and *Stirling*, for the Plaintiff.

Davey, Q.C., and *Romer*, for the Defendants.

JESSEL, M.R.:—

The articles of association, which are binding on the directors and on the company, are very plain.

The 107th Article is this: "No

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his Lordship granted an injunction restraining the Defendants from authorizing or making any payment to the ordinary share-

dividend shall be declared except out of the profits of the company." A general meeting cannot get over that. The dividend can never be declared but out of profits; and the allegation on the part of the Plaintiffs is that this dividend is not declared out of profits at all—that there are no profits available. The right to declare a dividend depends on the facts. The word "profits," by itself, is a word which is certainly susceptible of more than one meaning, and one must ascertain what it means in these articles. The 103rd Article says, "The directors shall, with the sanction of the company in general meeting, declare annual dividends, to be payable to the members out of the profits of the company, not exceeding the rate of 6 per centum per annum for each year, on the paid-up capital for the time being of the company, and of one-half the profits of the company above that amount, and they shall declare the other half of such surplus profits to be payable to the scripholders." Scripholders are another class who are not shareholders, who have subscribed moneys and are to be entitled to half the surplus profits. It is quite clear that, whatever these profits are, they are profits of the same kind: half the surplus is to go to the shareholders and the other half to the scripholders.

Then the next article is this: "The directors shall, before recommending any dividend, set aside out of the profits of the company, but subject to the sanction of the company in general meeting, such sum as they think proper as a reserve fund for maintenance, repairs, depreciation, and renewals." It is plain that these "profits" mean something after payment of the expenses; because you do not get a reserve fund at all until you have paid your current expenses. It is obvious that the word "profits" means net profits.

Then the next article is this: "The directors shall also, before recommending any dividend, set aside out of the profits of the company, a sum equivalent to one per centum per annum on the amount of the paid-up capital for the time being as a contingencies fund." There again "profits" obviously mean net profits. The result, therefore, of the articles, as I read them, is that a dividend shall only be declared out of net profits.

Then I have to consider the question, What are net profits? A tramway company lay down a new tramway. Of course the ordinary wear and tear of the rails and sleepers, and so on, causes a sum of money to be required from year to year in repairs. It may or may not be desirable to do the repairs all at once; but if at the end of the first year the line of tramway is still in so good a state of repair that it requires nothing to be laid out on it for repairs in that year, still, before you can ascertain the net profits, a sum of money ought to be set aside as representing the amount in which the wear and tear of the line has, I may say, so far depreciated it in value as that that sum will be required for the next year or next two years.

Take the case of a warehouse. Supposing a warehouse-keeper, having a new warehouse, should find at the end of the year that he had no occasion to expend money in repairs, but thought that, by reason of the usual wear and tear of the warehouse, it was a thousand pounds worse than it

holders in respect of dividend for the half-year ending the 31st of December, 1878, on the ground that, inasmuch as no proper

was at the beginning of the year, he would set aside £1000 for a repair or renewal or depreciation fund before he estimated any profits; because, although that sum is not required to be paid in that year, still it is the sum of money which is lost, so to say, out of capital, and which must be replaced. I should think no commercial man would doubt that this is the right course—that he must not calculate net profits until he has provided for all the ordinary repairs and wear and tear occasioned by his business. In many businesses there is a regular sum or proportion of some kind set aside for this purpose. Shipowners, I believe, generally reckon so much a year for depreciation of a ship as it gets older. Experience tells them how much they ought to set aside; and whether the ship is repaired in one year or another makes no difference in estimating the profits, because they know a certain sum must be set aside each year to meet the extra repairs of the ship as it becomes older. There are very many other businesses in which the same thing is done.

That being so, it appears to me that you can have no net profits unless this sum has been set aside. When you come to the next year, or the third or fourth year, what happens is this: as the line gets older the amount required for repairs increases. If you had done what you ought to have done, that is, set aside every year the sum necessary to make good the wear and tear in that year, then in the following years you would have a fund sufficient to meet the extra cost. Now, when I come to look at these articles, I think that is what is intended, and that that is the meaning of the reserve fund. What the company intended to do was this: inasmuch as they knew that maintenance, repairs, depreciation and renewals would be wanted, and inasmuch as they knew that according to the ordinary commercial rules they ought not to calculate the net profits until they had provided for this which was sure to happen, they said, "We will set aside a sum of money which we will call a reserve fund for this purpose." Although not expended during the year, it is a reserve fund set aside for expenditure in the following years, taken out of profits before a dividend is made. It appears to me, therefore, that these articles do recognise what seem to me sound commercial principles. That being so, from year to year, as the line got older it would get worse, and would, no doubt, require a larger expenditure every year for repairs and renewals, as a general rule —I say as a general rule, because sometimes the repairs may be so extensive as to make the renewal of a large portion of the line required in one year, and then the next year there might be a falling off in the amount required: but, as a general rule, as the line got older it would require more money.

Now, the line having been established seven years, I find an eminent engineer telling me in his affidavit in support of the motion that to put the line in a good state of repair will require £80,000: in other words, if you take the deterioration of the line from want of repair from its commencement, it is worth £80,000 less than it was at starting: that is the summary of that gentleman's evidence. He then thinks that those repairs, or the greater part of them, should be done at once. That is a matter of opinion on which engi-

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allowance had been made in the company's accounts for maintenance, &c., no part of the moneys of the company was in fact available or applicable for dividends on the ordinary shares for the year 1878.

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neers may fairly differ, and do differ. The Defendants' engineer, who, I am told, is also an eminent engineer, says he thinks they should not be done at once, but should be done gradually. But still, as I said before, they are to be done. That sum of money is required, or something like it. I cannot ascertain from the affidavit of the Defendants' engineer what sum he considers sufficient: I have no doubt he would fix a much smaller sum. However, for the purpose of my judgment I am willing to take a very large discount off the £80,000, because it is a very much larger sum indeed than is required to wipe away the whole of the dividend the company have declared. Therefore one need not consider whether it is £80,000 or £40,000: either sum would do that; but a very large sum it is, and the Defendants' engineer does not tell me how much.

I do not wish to prejudice any future application the company make under the leave I am going to reserve to them, but I will say that unless they give me something a great deal more definite as to the amount actually required for putting the line into repair than I have at present, I should certainly not be of opinion that the amount they propose to divide among the shareholders is fairly divisible.

[His Lordship then commented on the accounts for the half-year ending the 31st of December, 1878, observing that the existing "reserve fund" was altogether inadequate for the purposes of ordinary maintenance, &c., and that the "contingency fund" was not applicable to such purposes. His Lordship then continued:—] That being so, on the present evidence I am satisfied that there are no profits at present available for division. It may happen that there would have been profits if the company had properly applied the surplus of former years. I must say, looking at the accounts of the company, it appears to be a flourishing company, and I hope nothing I say will damage its future success: but still, I am bound by the articles to say that no dividend is to be paid except out of profits; that there are no profits available, and therefore I grant the injunction asked. At the same time I wish to give the Defendants every possible opportunity of shewing that there are profits available, and I also feel that my intervention is likely to be injurious to the company. If the Defendants can shew me at any time that there are profits available for the purpose of this dividend, I will give them an opportunity of doing so, and therefore I give them leave to move to dissolve the injunction I now grant.

The injunction granted restrained the Defendants from authorizing or making any payment out of the assets of the company in respect of the dividend declared in February, 1879, on the ordinary shares.

By consent the motion was afterwards treated as the trial of the action, and thereupon the injunction was made perpetual.

Solicitors: *W. Heggerty; H. C. Godfray.*

The company then stated in their defence in the present action, that the total sum which ought to have been charged against revenue for maintenance, &c., during the eight years from 1871 to 1878 instead of being paid away in dividends, amounted to £114,460 18*s.* 8*d.*, and that that sum, having been in fact paid out of capital, represented the amount by which the capital of the company had become diminished in value.

Under these circumstances the company insisted that the preference shareholders were not entitled to be paid any dividend until the company had, by means of the sums earned by them since the 30th of June, 1878, and to be earned, increased the small existing reserve fund applicable for maintenance, &c., to the sum of £114,460 18*s.* 8*d.*, or, in any case, until the preference shareholders had accounted for and repaid to the company the sums paid to them in excess of what they ought to have received for dividends had the accounts been properly kept.

The company, moreover, denied that in the two half-years in 1878 they earned profits properly applicable for the payment of dividends on the preference and ordinary shares, or that the sums which they had, upon a correct view of the accounts, actually earned as profits for the year ending the 31st of December, 1879, were properly applicable for payment of dividends on the preference shares.

They also denied that their tramways and works were in a state of efficiency, or that no expenditure beyond that necessitated by ordinary wear and tear was required. They alleged, on the contrary, that a considerable expenditure was necessary in order to put their tramways and other property into a thorough state of efficiency.

The action now came on for trial.

A report had been prepared by Messrs. *Waddell & Co.*, accountants, at the request of the directors of the company, shewing the amount of profits available for the preference dividend in the year 1878. This report was produced at the trial, and shewed that the balance of net revenue available for the preference dividend, after providing for current expenses, maintenance, repairs, &c., amounted to the sum of £14,932.

In reply to a question put by his Lordship in the course of the

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argument, Mr. *Waddell* stated that this £14,932 represented, in fact, the actual surplus receipts for the year 1878, after paying all expenses and reinstating the capital as on the 1st of January in that year.

Davey, Q.C., and *Stirling*, for the Plaintiff:—

According to the resolution of 1874, the preference shareholders are entitled to a dividend out of the profits of "the particular year"; and therefore, as the Defendants admit they earned profits for the year 1878, we are entitled to have our dividend out of those profits, independently of any previous year. The preference shareholders are in an entirely different position to the ordinary shareholders, whose rights alone your Lordship dealt with in *Davison* v. *Gillies* (1).

[They were then stopped by the Court.]

Chitty, Q.C., and *Romer*, for the Defendants:—

We submit that the company were not in a position to make, and could not make, any "profits" until their undertaking had been put into a money-earning condition. The articles of association, which your Lordship referred to in your judgment in *Davison* v. *Gillies*, expressly state that no dividend shall be declared except out of profits. We contend that when expenditure is required for recouping capital, the preference shareholders should, as regards a dividend, stand in the same position as the ordinary shareholders; for both classes of shareholders can only be paid out of income, that is to say, income remaining after payment of what is required for maintenance and repairs.

JESSEL, M.R.:—

I have no doubt what ought to be the decision on this question. What would have become of the other action if it had gone to trial and had been fully argued out, I do not know; but the order made on the motion for injunction seems to have been the right order on the then state of facts, although I think it has been assumed that I then decided a great deal more than I did really decide.

(1) *Ante*, p. 347, n.

However, the present question is, to my mind, a very simple one. There is a bargain made with the company that certain persons will advance their money as preference shareholders; that is, that they shall be entitled to a preferential dividend of 6 per cent. over the ordinary shares of the company, "dependent upon the profits of the particular year only." That means this, that the preference shareholders only take a dividend if there are profits for that year sufficient to pay their dividend. If there are no profits for that year sufficient to pay their dividend they do not get it: they lose it for ever; and if there are no profits in one year, and 12 per cent. profit the next year, they only get 6 per cent., and the other 6 per cent. goes to the ordinary shareholders. So that they are, so to say, co-adventurers for each particular year, and can only look to the profits of that year.

What happened was this. The company improperly allowed their tramways to get out of repair, and paid away their receipts to the ordinary shareholders in the shape of dividends. The result was that on the 1st of January, 1878, the tramways were very much out of repair, and wanted a large sum to put them in a proper state of efficiency. Notwithstanding that, the company did work, and they earned a good deal of money, the profits for the year 1878 being upwards of £14,000; and the dividend required being only 6 per cent. on £80,000, it is quite clear they earned more than sufficient to pay the preference shareholders, supposing these were fairly-earned profits. To see that they were fairly-earned profits, I must look at the report, which I have before me, of an eminent accountant, Mr. *Waddell*, who says they were. He says, in effect, that, considering the state of the line on the 1st of January and the state of the line on the 31st of December in that year, after setting aside sufficient to make good the wear and tear for that particular year, and paying all expenses, there was a net balance of £14,932. That is admitted by the 20th paragraph of the statement of defence, which says, "If a proper proportionate amount had been charged against the revenue of the year 1878 for such maintenance, &c., as aforesaid, the accounts would have shewn, as the fact is, that there was a balance of revenue, and in that sense a net profit in that year of only £14,932 5*s.* 4*d.*" Therefore if "profits for

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the year" have any meaning at all, these were the profits for the year. "Profits for the year" of course mean the surplus in receipts, after paying expenses and restoring the capital to the position it was in on the 1st of January in that year. I have had the advantage of having Mr. *Waddell* present in Court, and ascertaining from him that his report in the sense I have stated is expressed according to his meaning, and that there is no mistake in the admission in the defence; that is to say, there was an actual net profit for that year of upwards of £14,000. Then what is there to argue? The argument for the company amounts to this, that inasmuch as they have improperly paid to their ordinary shareholders very large sums of money which did not belong to them, they, the company, are entitled to make good that deficiency by taking away the fund available for the preference shareholders to an amount required to put the tramway in proper order. When the argument is stated in that way, it is clear that it cannot be sustained. The company either have a right to recover back from the ordinary shareholders any sums over-paid or not. If they have a right, they must recover them; if they have no right to recover them, *à fortiori* they have no right to recover them from the preference shareholders, and, of course, still less right to take away the dividends from the preference shareholders.

It appears to me that the defence is founded on a misconception, and, I am afraid, a misconception of what I am supposed to have decided on a former occasion; but I have no hesitation in making the declaration which I am asked to make, and deciding in favour of the Plaintiff in this action.

Solicitors: *King & Peto; Harrison, Beal, & Harrison.*

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[1880 A. 0450.]

M. R.
1880
Nov. 16.

Vendor and Purchaser—Easements—Lights—Dominant and Servient Tenement—Purchase by different Persons from same Vendor—Con'emporaneous Conveyances—Injunction.

Where the owner of a dwelling-house and adjoining land sells the house to one person and the land to another under contemporaneous conveyances, either purchaser being aware of the conveyance to the other, the purchaser of the land is not entitled to build thereon so as to obstruct the lights of the house.

A testator being owner in fee of a piece of land with two dwelling-houses thereon, and of another piece of land immediately adjoining, with a warehouse at the further end thereof, devised his real estate to his two sons and another person in trust for sale, giving his two sons, or either of them, an option of purchasing any part of his real estate. By two separate but contemporaneous conveyances, executed by the trustees of the will, the one piece of land and the two dwelling-houses thereon were conveyed for value, "together with all lights thereunto belonging," and all the estate, &c., to the one son in fee, and the other adjoining piece of land and the warehouse were conveyed for value, together with all lights, &c., and all the estate, &c., to the other son in fee:

An injunction was granted restraining the successor in title to the purchaser of the last-mentioned piece of land and warehouse from building on his land in such a way as to obstruct his neighbour's lights.

Wheeldon v. *Burrows* (1) considered.

EDWARD ALLEN, being seised in fee of a piece of land in the town of *Leicester*, with two dwelling-houses thereon, and also of another piece of land immediately adjoining, with a warehouse at the further end thereof, by his will devised all his real estate to his two sons, *Richard Allen* and *Matthew Henry Allen*, and to *Samuel Stone*, in trust for sale; and by a codicil the testator gave his said two sons, notwithstanding they were trustees, an option of purchasing, either together or separately, any part of his real estate that they should think fit at a valuation.

The testator died in July, 1863.

By an indenture dated the 17th of March, 1864, in pursuance of the will and codicil the three trustees conveyed for value the

(1) 12 Ch. D. 31.

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one piece of land and the two dwelling-houses thereon, "together with all buildings, &c., lights, easements, and appurtenances thereunto belonging, and all the estate," &c., to the use of the Plaintiff, the said *Richard Allen*, in fee.

By another indenture of the same date the trustees conveyed for value the adjoining piece of land with the warehouse, together with all lights, &c., and all the estate, &c., to the use of the said *Matthew Henry Allen*, in fee.

Matthew H. Allen subsequently died, and his widow and devisee sold and conveyed the property comprised in the last-mentioned conveyance to the Defendant *Taylor* in fee.

One of the houses conveyed to the Plaintiff contained certain windows—which were ancient lights—overlooking the Defendant's land.

The Defendant having commenced erecting on his land a row of houses which would have the effect of blocking up or obstructing the Plaintiff's lights, the Plaintiff brought this action for an injunction to restrain the Defendant from erecting any building upon his land so as to obstruct the Plaintiff's lights.

Ince, Q.C., and *W. S. Owen*, for the Plaintiff:—

We submit that the Defendant—who is in no better position than his predecessor in title—has no right to obstruct our lights. Where a house and land are separately conveyed by one vendor contemporaneously to different persons, the vendor is presumed to grant a right to light to the purchaser of the house, and the purchaser of the land takes it subject to the restriction that he may not build so as to obstruct the light: *Palmer* v. *Fletcher* (1); *Compton* v. *Richards* (2); *Swansborough* v. *Coventry* (3). Here we have an express grant of the house, "together with all lights thereunto belonging;" that is, the lights enjoyed at the time of the grant. The general rule is that on the grant by the owner of a tenement as it is then used and enjoyed, there will pass to the grantee the continuous and apparent easements, or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the

(1) 1 Lev. 122: 1 Sid. 167, 227. (2) 1 Price, 27.
(3) 9 Bing. 305.

grant used by the owner of the entirety for the benefit of the part granted: *Wheeldon* v. *Burrows* (1); *Pyer* v. *Carter* (2): the grant being read against the grantor, who cannot derogate from his own grant.

Chitty, Q.C., and *Cozens-Hardy*, for the Defendant:—

In *Suffield* v. *Brown* (3), Lord *Westbury* expressed his disapproval of *Pyer* v. *Carter*, and said that if the owner of the entirety sells the servient part of his estate, there are not reserved to him, in the absence of express stipulation, such continuous and apparent easements as have been used by the owner for the benefit of the unsold portion during the unity of ownership, for the grantor cannot derogate from his own absolute grant so as to claim rights over the land sold, though there were *quasi*-easements of an apparent and continuous character at the time of the grant: and a purchaser from the owner can be in no better position. *Pyer* v. *Carter* is also dissented from in *Wheeldon* v. *Burrows*. "Lights thereunto belonging" mean lights belonging to the property in point of law. The *onus* lies on the Plaintiff to prove his right to these lights, and in order to do so he must shew that his deed was executed before ours; but this he cannot shew.

[JESSEL, M.R.:—I must treat the conveyances as executed contemporaneously.]

Then the Plaintiff's deed was not executed before ours, and therefore he cannot claim rights not expressly reserved to him by our deed.

JESSEL, M.R.:—

I wish, if I can, to follow the decision of the Court of Appeal, and I hope I do not misunderstand it. There can be no doubt that the law as laid down by *Palmer* v. *Fletcher* (4) is the law of the present day; that is, that where a man grants a house in which there are windows, neither he nor anybody claiming under him can stop up the windows or destroy the lights. That is based on the principle that a man shall not derogate from his own grant;

(1) 12 Ch. D. 31, 49.
(2) 1 H. & N. 916.
(3) 33 L. J. (Ch.) 249.
(4) 1 Lev. 122; 1 Sid. 167, 227.

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and it makes no difference whether he grants the house simply as a house, or whether he grants the house with the windows or the lights thereto belonging. In both cases he grants with the apparent easements or *quasi*-easements. All that is now, I take it, settled law.

I take it also that it is equally settled law that if a man who has a house and land grants the land first, reserving the house, the purchaser of the land can block up the windows of the house.

Then there comes a third case. Supposing the owner of the land and the house sells the house and the land at the same moment, and supposing he expressly sells the house with the lights; can it be said that the purchaser of the land is entitled to block up the lights—the vendor being the same in each case, and both purchasers being aware of the simultaneous conveyances? I should have said certainly not. In equity it is one transaction. The purchaser of the land knows that the vendor is at the same moment selling the house with the lights, and as part of one transaction he takes the land: he cannot take away the lights from the house. But, as I said before, it is a question of what is the settled law on the subject. I see the point is so stated in almost so many words by Lord Chief Justice *Tindal* in *Swansborough* v. *Coventry* (1). He says (2), "In the present case, the sales to the plaintiff and the defendant being sales by the same vendor, and taking place at one and the same time, we think the rights of the parties are brought within the application of this general rule of law," namely, that a grantor shall not derogate from his own grant.

It appears that the same point was decided in *Compton* v. *Richards* (3). That was a case of a sale by auction at the same time of a house and some land, and it was held that the purchaser of the house was not to have his window blocked up by the purchaser of the land. It was a single transaction in one sense, although it was a double transaction as between two persons, each being aware of what the other bought, and that it was intended that the man who bought the house with the lights should keep the house so.

The last case on the subject is *Wheeldon* v. *Burrows* (4). As

(1) 9 Bing. 305.
(2) Ibid. 309.
(3) 1 Price, 27.
(4) 12 Ch. D. 31.

far as I understand the decision of the Appeal Court in that case, the exception in *Swansborough* v. *Coventry* (1) and *Compton* v. *Richards* (2) was approved. In *Swansborough* v. *Coventry* the case was open to great doubt. There was a sale by auction which we have not here; and there is something here which was not there. There was there, and here, a continuous and apparent easement. In the judgment in *Wheeldon* v. *Burrows* (3) the case is treated as an exception to the general rule that if a grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. The late Lord Justice *Thesiger* says this (4): "It is said that, even supposing the maxims which I have stated to be correct, this case is an exception which comes within the rule laid down in *Swansborough* v. *Coventry* and *Compton* v. *Richards*, namely, that, although the land and houses were not in fact conveyed at the same time, they were conveyances made as part and parcel of one intended sale by auction." Then he says that that will not do. Then he goes on to say, "In the cases which have been cited the conveyances were founded upon transactions which in Equity were equivalent to conveyances between the parties at the time when the transactions were entered into, and those transactions were entered into at the same moment of time and as part and parcel of one transaction." So that he evidently means to say that such a case as that is an exception to the general rule, and you cannot block up the lights.

The particular case before me is the strongest case of the kind I ever saw, for both of the purchasers were also vendors, and were parties to both conveyances. It is not the mere case of a vendor by contemporaneous conveyance selling to two different purchasers, but the two purchasers were two of the three trustees of a will, and an option was given to the two purchasers, or either of them, to buy any part of the real estate that they thought fit, notwithstanding they were trustees; and then, by contemporaneous conveyances, each with the assent of the other exercised his option as to some of the houses and lands, for they both bought houses and both bought lands. It is not like the case of a man buying land alone or a house alone. The three trustees conveyed

(1) 9 Bing. 305.
(2) 1 Price, 27.
(3) 12 Ch. D. 31.
(4) Ibid. 59.

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to the purchaser, one trustee, land with a house built upon it, together with the lights thereto belonging, and all the estate. Can people who have been parties to two transactions in this way say that they were otherwise than one transaction, and that both parties who bought houses with lights were not to get the lights? It appears to me, independently of authority, that in such a case as this there is a manifest intention shewn that the houses sold were to retain their lights, and that neither purchaser could on his land erect any obstruction which would block up or destroy the lights of his neighbour.

His Lordship accordingly granted the injunction with costs.

Solicitors: *Geare & Son*, agents for *J. Martin, Nottingham; Field, Roscoe, & Co.*

M. R.
1880
Dec. 4.

In re HARDIMAN.
PRAGNELL *v.* BATTEN.

[1880 P. 2152.]

Practice—Partition Action—Order for Sale—Absent Parties—Dispensing with Service of Judgment—Partition Act, 1876 (39 & 40 *Vict. c.* 17), *s.* 3—*Form of Judgment.*

21 Ch D 678, 683,

In a partition action, the Court, in ordering a sale at the request of the parties to the action, will not, in the absence of the other parties interested, preface the judgment order for sale with an expression of its opinion that a sale is more beneficial than a partition.

Form of judgment order for sale in a partition action providing that service of the judgment may be dispensed with under sect. 3 of the *Partition Act*, 1876.

THIS was an action for a sale under the Partition Acts of certain freehold and leasehold hereditaments in the county of *York*. The Plaintiff was the owner of one undivided fifth of the property, and the Defendants were the owners of another undivided fifth. The remaining three-fifths had been vested in three persons who were now dead, but their real and personal representatives could not be found.

The statement of claim alleged that, having regard to the nature of the property and the number of persons interested therein, a sale of the property and distribution of the proceeds would be more beneficial for the parties interested than a division of the property.

The Plaintiff and the Defendants desiring a sale, the action now came on upon motion for judgment as a short cause upon prepared minutes.

The minutes followed Form 3, of judgment order given in *Seton* on Decrees (1) with the variation hereinafter mentioned, the directions for the usual inquiries and a sale being prefaced with the words, "And this Court being of opinion that by reason of the nature of the property such sale and distribution will be more beneficial for the persons interested than a division of the property between or among them."

The latter portion of the minutes was a variation of the latter portion of Form 3 above mentioned, and stood as follows: "But in case it shall be certified that some of the persons interested are not parties to this action, any of the persons interested are to be at liberty, after it shall have been certified that all persons who are not parties and who ought to be served with notice of this judgment have been so served, or that service of such notice has been dispensed with, to apply at Chambers for an order for sale of the said hereditaments: And any party to this action is to be at liberty to apply at Chambers for an order dispensing with such service on any person who cannot be served, or who cannot be served without expense disproportionate to the value of the said hereditaments."

S. Hall, for the Plaintiffs.

Caldecott, for the Defendants, submitted that as all persons interested were not parties the order should not be prefaced as above mentioned; and that the remainder of the order should follow Form 3 without the proposed variations

S. Hall submitted that the preface in Form 3 was inserted

(1) 4th Ed. p. 1005.

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notwithstanding that—as was apparent from the inquiries there directed—all persons interested were not parties; that under sect. 9 of the *Partition Act*, 1868, no objection could be taken for want of parties, for after service of notice of the judgment the absent parties must be deemed to have been parties: and that Form 3, as varied in the proposed minutes, was the proper form of judgment, having regard to the allegations in the statement of claim and to sect. 3 of the *Partition Act*, 1876.

JESSEL, M.R., held that the proposed prefatory opinion ought not to be inserted in the absence of the parties interested, because, after service of the notice of judgment, they must be deemed parties as though they had been originally parties; and therefore, on the subsequent application for sale, they would be bound by that expression of opinion, and it was unfair to decide as to the propriety of a sale in their absence. His Lordship thought the form in *Seton* was clearly wrong in that respect, and directed the prefatory opinion to be omitted from the minutes. He also thought that, having regard to sect. 3 of the *Partition Act*, 1876, Form 3 should be varied as proposed by the minutes, and therefore directed that portion of the minutes to remain.

Solicitors: *Van Sandau & Cumming*, agents for *Farrar & Hall, Manchester.*

M. R.
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Dec. 18.

WALLACE *v.* GREENWOOD

[1879 W. 406.]

Practice—Partition Action—Married Woman—Request for Sale—Authority to act on her behalf—Request by Counsel—Purchase-money—Conversion—Fund under £200*—Election—Separate Examination—Partition Act*, 1876 (39 & 40 *Vict. c.* 17), *s.* 6.

In a partition action, an order for sale of a married woman's share of real estate when made with her consent or at her request under sect. 6 of the *Partition Act*, 1876, operates as a conversion of such share into personal estate.

In a partition action a request for sale on the part of a married woman, under sect. 6 of the *Partition Act*, 1876, should be made by a person

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specially authorized to act on her behalf in the action: a request by her counsel is not sufficient.

Crookes v. *Whitworth* (1) not followed.

Where, in a partition action, the share of a married woman in the proceeds of sale of real estate is under £200, the Court will order the same to be paid out to her upon her separate receipt and upon an affidavit of no settlement, and will dispense with her separate examination as to her election to take the money as personal estate.

In re Shaw (2) not followed.

THIS was an action for the sale or partition of certain real estate devised by the will of *William Butler*, deceased, the property being vested in the Plaintiffs and Defendants in undivided shares. Some of the parties were infants, and others married women, suing and sued with their husbands.

By the judgment, dated the 29th of November, 1879, the Plaintiffs and Defendants (other than the infants) who claimed to be entitled to a moiety and upwards "by their counsel requesting a sale and distribution of the proceeds instead of a division," the Court ordered an inquiry as to the parties interested, also an inquiry whether a certain contract with a purchaser for the sale of the property was for the benefit of the parties, and, if so, that the contract should be carried into effect.

By his certificate the Chief Clerk certified as to the parties and the shares in which they were interested.

By an order dated the 22nd of April, 1880, the contract was declared to be for the benefit of the parties, and it was ordered that the property should be conveyed to the purchaser and the purchase-money paid into Court. The conveyance was subsequently certified by the Chief Clerk, and the purchase-money paid into Court accordingly.

The action now coming on upon further consideration, it was proposed by the minutes, in distributing the purchase-money, to pay the shares of the married women, amounting to about £50 each, to the husbands "in right of" their wives.

J. G. Wood, for the Plaintiffs:—

The question is whether the married women should be separately examined in order to signify their election to take their shares of

(1) 10 Ch. D. 289. (2) 49 L. J. (Ch.) 213.

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the proceeds of sale as personal estate. In the recent case of *In re Shaw* (1), Vice-Chancellor *Bacon* held that separate examination was necessary even where the share was under £200.

I submit, however, that the order for sale, being made upon the request of the married women, under sect. 6 of the *Partition Act*, 1876, effected a conversion of their shares into personal estate; the request for sale by their counsel authorized to act on their behalf being a sufficient compliance with the section: *Crookes* v. *Whitworth* (2). Separate examination as to their election seems therefore unnecessary.

[He also referred to *Standering* v. *Hall* (3); *Mildmay* v. *Quicke* (4); *Kelland* v. *Fulford* (5); *Arnold* v. *Dixon* (6); *Rimington* v. *Hartley* (7).]

Smalman Smith, for the Defendants.

JESSEL, M.R.:—

I must say I should not have found any difficulty in this case had it not been for two decisions by Vice-Chancellor *Bacon*. Those decisions do not appear to me to be quite consistent, and with great respect I do not think they are right.

In *Crookes* v. *Whitworth*, the Vice-Chancellor decided that in a partition action a request for sale by a married woman might be made by her counsel authorized to act on her behalf, that is, without her separate examination.

In *In re Shaw*, he held that, in a similar action, a married woman's election to take her share (though under £200) of the proceeds of sale of real estate as personalty could only be taken by her separate examination.

Both things are really very simple; in the one case the Court requires evidence of the authority to make the request for sale on behalf of the married woman; and in the other it requires evidence of the married woman's desire for conversion of her realty into personalty.

There can be no doubt, I think, that the word "authorized" in

(1) 49 L. J. (Ch.) 213.
(2) 10 Ch. D. 289.
(3) 11 Ch. D. 652.
(4) 6 Ch. D. 553.
(5) Ibid. 491.
(6) Law Rep. 19 Eq. 113.
(7) 14 Ch. D. 630.

the 6th section of the *Partition Act*, 1876, must mean "authorized in some special manner": however, the Act does not point out any special manner. The Vice-Chancellor seems to have considered that the authority of her counsel was sufficient to signify a married woman's request for a sale; but I should have thought the Act required some special authority beyond that: if not, I do not see why the same authority should not be sufficient to signify her election to take her real estate as money. The Act says "authorized to act on behalf of" the married woman, or other person under disability; that is, as I have already pointed out in *Rimington* v. *Hartley* (1), "authorized to act in the action." Here no one is authorized to act on behalf of the married woman in the action; for when a married woman appears jointly with her husband, as she does here, we do not consider it her appearance at all: it is the habit to say it is the husband's appearance. Therefore, had it not been for the case of *Crookes* v. *Whitworth* (2), I should have thought the Court would require some separate authority on behalf of the married woman. Certainly, speaking for myself, I should not be satisfied unless there were some separate and special authority on her behalf.

Let us first consider what the Act means. The 6th section says, "In an action for partition, a request for sale may be made, or an undertaking to purchase given on the part of a married woman, [infant, person of unsound mind, or person under any other disability, by the next friend, guardian, committee in lunacy (if so authorized by order in lunacy), or other person authorized to act on behalf of the person under such disability; but the Court shall not be bound to comply with any such request or undertaking on the part of an infant unless it appear that the sale or purchase will be for his benefit." Now, a sale under that section of the Act, in my opinion, operates as a conversion. Where the Court has power to sell an infant's real estate, and orders it to be sold, the order operates as a conversion, and the estate then becomes personalty. There is no law that I am aware of which says that the Court is bound to preserve an infant's estate as realty during infancy: therefore, if the Court thinks it for the benefit of the infant to sell his estate, it has no hesitation in making an order for sale, and the estate then

(1) 14 Ch. D. 630. (2) 10 Ch. D. 289.

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becomes converted into personalty. And the effect is the same in the case of a purchase. You may give an undertaking on behalf of an infant to purchase real estate, and this undertaking operates under the statute as a conversion into realty of the infant's personal estate so to be laid out. It is, however, the practice of the Court to provide against the consequences of conversion, because it is considered right to do so: accordingly, the purchase is made in a manner authorized by practice. It is not necessary to reconvert the real estate purchased into personalty: the practice in Chancery is to declare the estate purchased out of the infant's money subject to a charge in favour of his personal estate.

That is the practice, but there is no law that obliges the Court to do so: it is the practice, but not the law; and, moreover, the fact that it is not the law is shewn by the practice being as I have stated. In other words, if the Court does buy an estate on behalf of an infant, there is no law which compels the Court to prevent conversion taking place; but according to the practice, a trust is declared, on conveyance, to recoup the infant's personal estate.

Having regard, then, to the 6th section of the *Partition Act*, 1876, when you have a request for sale made by a competent person, all the consequences will follow, including conversion.

It may be said, however, that a married woman is in a different position to an infant, because she is absolute owner of her real estate, subject to her husband's estate as tenant by the curtesy; and that if she sells, the purchase-money becomes his estate, subject only to her equity to a settlement. That is true; but the Act has enabled her to judge for herself whether she shall sell or not. She could no doubt have sold and conveyed her estate before the Act, by a deed acknowledged under the *Fines and Recoveries Act;* but now, instead of selling by a deed acknowledged, she sells by statute; that is to say, by giving her consent. That being so, if the married woman consents, there is conversion: if she does not consent, it does not appear to me that conversion will follow. It will be observed that the check imposed by the latter part of the 6th section as regards a sale or purchase on behalf of an infant is not extended to the case of a married woman: and, singularly enough, it is not even extended to the case of a person of unsound mind: perhaps the reason for this

omission is that the draftsman forgot the case of a person of unsound mind not so found by inquisition, where there ought really to be the same check.

The result is, that, in my opinion, since the Act of 1876, a married woman consenting to or requesting a sale of her real estate is in the same position as if she had converted the property by an acknowledged deed. Then the question is, is there sufficient evidence of her request or consent in the present case? I am of opinion there is not. There should be something definite to shew her request or consent. It appears to me that in this case the authority to request a sale is not sufficient; or rather, it is not sufficiently proved.

Then I come to the next point. If the married woman's authority is not sufficiently evidenced, the purchase-money is liable to be laid out in the purchase of other real estate, unless she elects to take it as personal estate: and she can signify such election by separate examination. But her separate examination may be dispensed with as to waiving her equity to a settlement where the fund is under £200: that is in order to save expense where the fund is small. If the reason is good for anything it is good also in the case of a sale by the husband, treating the sale in the present case as in fact a sale by the husband. If the Court can dispense with examination in the one case, it can do so in the other; because the reason why formerly the Court, by separate examination, took a married woman's consent to treat money arising from the sale of her real estate as personal estate was that the Court would not put her to the expense of a fine; so that the Court took her consent upon her separate examination in lieu of a fine.

For the same reason that the Court will, on the ground of expense, dispense with examination as to waiving the equity to a settlement where the fund is small, I shall dispense with the examinations of the married women in this case; and, to make the analogy to the established practice complete, I will order the money in each case to be paid out to the married woman on her separate receipt, and on an affidavit of no settlement being filed.

Solicitor: *J. H. Lee*, agent for *D. Whittingham, Nottingham.*

V.-C. M.
1880
Dec. 16.

CROWDER *v.* STEWART.

[1880 W. 604.]

Retainer—One Executor—Joint Creditors—32 & 33 Vict. c. 46.

One of three executors who is also one of two joint creditors has a right of retainer in respect of his joint debt.

The right of retainer is not affected by the Act abolishing the distinction between specialty and simple contract debts.

H. J. G. BISSILL was one of the three executors of the will of *W. W. Stewart;* and he and *G. A. Crowder* were joint bond creditors on the estate of *W. W. Stewart* for £5000, and interest.

The estate of the father of *W. W. Stewart* was under administration in the suit of *Dunlop* v. *Stewart,* in which a receiver had been appointed. A sum of £204 was due to the estate of *W. W. Stewart* from the estate of his father, and an application was now made by summons in the action of *Crowder* v. *Stewart,* which was for the administration of the estate of *W. W. Stewart,* that *H. J. G. Bissill,* as one of the executors of *W. W. Stewart,* might be at liberty to receive this sum of £204 from the receiver in *Dunlop* v. *Stewart,* and retain the same in respect of the balance of the sum of £5000, and interest.

Glasse, Q.C., and *Bissill,* in support of the application:—

This money is no doubt under the control of the Court, but is nevertheless legal and not equitable assets: *Cook* v. *Gregson* (1); *Richmond* v. *White* (2); *Eddis* on Assets (3); and the executor has his right of retainer; nor does the fact that he is one of two creditors and one of three executors affect the question: *Sander* v. *Heathfield* (4); *Boyd* v. *Brooks* (5).

J. Pearson, Q.C., and *Badcock:*—

The doctrine of retainer has always been disapproved of, and the Court will not encourage or extend it; therefore *Hinde*

(1) 3 Drew. 547.
(2) 12 Ch. D. 361.
(3) Page 5.
(4) Law Rep. 19 Eq. 21.
(5) 34 Beav. 7; and on appeal, 34 L. J. (Ch.) 605.

Palmer's Act (32 & 33 Vict. c. 46) must be held to have abolished it. That Act puts an end to the distinction between specialty and simple contract debts, and in fact to the distinction between legal and equitable assets, and makes all assets equitable; therefore if the right of retainer is held still to exist, it must be extended by that Act to equitable assets, and to give priority to a simple contract creditor. But the Court will not extend the doctrine, and it must therefore be taken to be abolished. Besides, Mr. *Bissill* has no right to ask the Court to direct payment to him alone, so as to give him this right of retainer. Why should he make this application instead of waiting until the money comes into Court; and what right has he to retain for the benefit of himself and another?

Glasse, in reply:—

In re Williams' Estate (1) and *Hanson* v. *Stubbs* (2) shew that *Hinde Palmer's Act* only affects the priority of specialty debts and goes no further.

MALINS, V.C.:—

The point I have to decide here is the right of one of three executors to exercise a right of retainer; and I can only repeat what I said on a former occasion, and what almost every other Judge has said, that the right of retainer is a relic of old law, not founded on justice, and working the greatest possible injustice. During these very sittings I had a case where it could not be denied that the right of retainer existed, but the result of that was that as there was a large debt due to the executor the retainer reached every farthing of the assets and the other creditors were entirely unpaid. That is a state of law so inequitable that it cannot be abolished too soon.

Mr. *Pearson* says it is unnecessary to make any further alteration in the law, because the law is altered already; and if Mr. *Pearson* could succeed in that I should have been very glad. He says that the law has, in fact, been altered by Mr. *Hinde Palmer's Act* (32 & 33 Vict. c. 46). Mr. *Pearson* very properly says that a statute should be construed with reference to the mischief intended

(1) Law Rep. 15 Eq. 270. (2) 8 Ch. D. 154.

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to be remedied, and he reads the recital of the Act to shew the intention of the Legislature. But the recital is, "Whereas it is expedient to abolish the distinction as to priority of payment between specialty and simple contract debts of deceased persons." That, and that alone, is the object of the Act, and that distinction was, in my opinion, about as absurd and inequitable as the right of retainer. One distinction has been abolished, and I am sorry to be obliged to come to the conclusion that the other has not. When in Parliament I passed a bill through the House of Commons which had two objects, one was that which was accomplished by Mr. *Hinde Palmer's Act*, the other was to abolish the right of retainer by executors. The Bill was not passed by the House of Lords, and did not become law. Mr. *Hinde Palmer* took up one of the objects, but I am not sure whether he attempted the other. He certainly accomplished the one, namely, the abolition of the distinction between specialty and simple contract debts. Mr. *Pearson* says the Act goes beyond that, but the object of the Act is to abolish the distinction between specialty and simple contract debts, and the recital of the Act is that that alone is the object. I must therefore read the enactment as corresponding with the express recital of its object; and if I find words that may be carried further, I must read them with reference to the mischief intended to be remedied and to the express recital of the Act. [The Vice-Chancellor read the words of the Act.] What is the meaning of "standing in equal degree"? It must mean equality as between specialty and simple contract creditors. It does not say a word about the right of the executor to retain. Mr. *Pearson* says this must have been the intention, because otherwise this most unjust law as to the right of retainer has been greatly extended. That may be so. Undoubtedly the law was that a creditor by simple contract could not retain as against a specialty creditor, but the difference being abolished he now has a right of retainer; that however is simply the result of the enactment that all the distinctions between specialty and simple contract debts should be abolished. Therefore the executor has the right of retainer against all creditors instead of against some only. But I cannot hold that to be a ground for the extended construction which Mr. *Pearson* contends for. I am of opinion that

although the Act says they are to be paid equally, it means as between simple contract and specialty creditors, and does not interfere with the right of retainer. I am, therefore, of opinion that the right of retainer is as it was before this Act, and I must hold that the right exists in this case. Therefore, I come to the conclusion that Mr. *Bissill* has the right which he claims.

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It is also said that Mr. *Bissill* is a trustee, but I have already decided that point in *Sander* v. *Heathfield* (1). I decided that he is bound to exercise the right of retainer if the *cestuis que trust* require him to do so. The mere circumstance of Mr. *Bissill* being a trustee does not affect the question.

I am glad to find from Mr. *Glasse* that the view I have taken of the Act has received the sanction of Vice-Chancellor *Wickens* in *In re Williams' Estate* (2), and of the Master of the Rolls in *Hanson* v. *Stubbs* (3).

Solicitors for Mr. *Bissill: Jones, Blaxland, & Sons.*
Solicitors for the Creditors: *Crowder, Anstie, & Vizard.*

ROBINSON *v.* PICKERING.

V.-C. M. 1881 Jan. 11.

[1880 R. 2101.]

Debt—Separate Estate—Charge—Interim Injunction.

The Plaintiff claimed a charge on the separate estate of a married woman for the price of goods supplied to her on the credit of her separate estate. The married woman and her husband alleged that the goods had been supplied on the credit of the husband.

The husband and wife and the trustees of the separate estate were on motion restrained from parting with the property forming the separate estate until the action was disposed of.

Reversed by Ch. App. 16 Ch. D. 660

BY an indenture of appointment dated the 5th of June, 1873, *Ada Frances Pickering*, wife of *J. L. Pickering*, appointed that the trustees of a certain indenture of settlement should stand possessed of certain chattels and effects and of the furniture and household

(1) Law Rep. 19 Eq. 21. (2) Law Rep. 15 Eq. 270.
(3) 8 Ch. D. 154.

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goods therein mentioned upon trust for *Ada F. Pickering* for her sole and separate use.

The Plaintiff, *J. P. Robinson*, was a linendraper, and by his statement of claim, supported by his affidavit, he alleged that he had supplied Mrs. *Pickering* with goods to the amount of £436 on the credit of her separate estate and with intent to charge her separate estate; and he prayed for a declaration that he had a charge upon the separate estate, and for consequent relief; and that in the meantime the Defendants might be restrained from parting with the property.

The Plaintiff now moved for an injunction to restrain Mr. and Mrs. *Pickering* and the trustees from selling or dealing with the separate estate of Mrs. *Pickering* pending the action.

Mr. and Mrs. *Pickering* deposed that the goods had been furnished on the credit of Mr. *Pickering*, and that the Plaintiff knew nothing of the separate estate.

Dundas Gardiner, for the Plaintiff:—

The Plaintiff has in equity a charge on this property which he can enforce in the usual way. It is not like a common law right, as he has no remedy *in personam* but only *in rem*, and if the chattels are disposed of he has no remedy.

Terrell, for Mrs. *Pickering*:—

No Court has ever restrained a defendant from dealing with his own property until the plaintiff has shewn himself to be in the right. How is the Defendant to live if her property is tied up in the way proposed?

[MALINS, V.C., referred to *Pike* v. *Fitzgibbon* (1).]

Romer, for the trustees.

Dundas Gardiner, in reply.

MALINS, V.C.:—

This lady appears to have had a house handsomely furnished, and if she is an honest woman she will pay her debts. I must

(1) 14 Ch. D. 837.

give her credit for intending to do so, and for having no intention of disposing of the furniture. I think that I have power to order this furniture to be kept until the action is disposed of or the Court makes some further order.

Solicitor for Plaintiff: *T. A. G. Powell.*
Solicitors for Mrs. *Pickering: Elmslie, Forsyth, & Sedgwick.*
Solicitors for the Trustees: *Frank Richardson & Sadler.*

In re ASSOCIATION OF LAND FINANCIERS.

Bankruptcy—Winding-up—Servants' Wages—32 & 33 Vict. c. 71, s. 32.

The rule in bankruptcy that servants' wages shall be paid in priority to all other debts, is, by sect. 10 of the *Judicature Act*, 1875, extended to windings up.

~~*In re Albion Steel and Wire Company* (1) followed.~~

AN order had been made for winding up the *Association of Land Financiers*, and on settling the list of debts of the association, seven clerks of the association claimed in Chambers to be paid in full four months' salary each, amounting altogether to about £250. His Lordship had allowed the claim, and the official liquidator now moved to discharge that order. It was stated that the debts of the company were very large, and that the assets were very small.

Whitehorne, in support of the motion:—

No doubt, under the *Bankruptcy Act*, 1869, s. 32, sub-s. 2 (2), servants and clerks have a right to be paid in full, but the question is whether this is extended to windings up by sect. 10 of the *Judicature Act*, 1875, which provides that in the winding-up of

~~(1) 7 Ch. D. 547.~~

(2) 32 & 33 Vict. c. 71, s. 32, provides that the debts thereinafter mentioned shall be paid in priority to all other debts:—

1. All rates, taxes, &c.

2. All wages or salary of any clerk or servant in the employment of the bankrupt at the date of the order of adjudication, not exceeding four months' wages or salary, and not exceeding £50; all wages of any labourer or workman in the employment of the bankrupt at the date of the order of adjudication, and not exceeding two months' wages.

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any company "the same rule shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities proveable . . . as may be in force for the time being under the law of bankruptcy." Of course, these clerks can prove for their salaries, but we contend that they have no right to any priority, and that the rule in bankruptcy has not been extended. No doubt *In re Norton Ironworks Company* (1) is against us, but that is inconsistent with *In re Albion Steel and Wire Company* (2) and in *In re Coal Consumers Association* (3). *In re Bridgewater Engineering Company* (4), *In re Printing and Numerical Registering Company* (5), *In re Richards & Co.* (6), and *In re Withernsea Brickworks* (7), are all in our favour.

Buckley, for the clerks, was not called upon.

MALINS, V.C.:—

This is an important question, and the liquidators have thought proper to raise it, although the sum claimed is not large, being under £300, whilst the debts of the company are hundreds of thousands, so that the claim cannot be of consequence to the general body of the creditors. As a general principle, it seems absurd that a poor man whose week's wages are unpaid should have to wait and come in with the general body of creditors. It can hardly have been the intention of the Legislature which benevolently extended to wages the provisions as to rates and taxes. [His Lordship then read the sub-section of the Act of 1869.] It is very unfortunate that this was not embodied in the Winding-up Acts, but I have always been of opinion, as I decided in *Kellock's Case* (8), that a winding-up is the same as a bankruptcy, and that as far as possible the rules of bankruptcy ought to apply. I am of opinion that sect. 10 of the Act of 1875 must have been intended to apply to such a case, and the only question is whether the words carry out the intention. [His Lordship read the section.] It says that as to unsecured creditors the rules of

(1) 26 W. R. 53.
(2) 7 Ch. D. 547.
(3) 4 Ch. D. 625.
(4) 12 Ch. D. 181.
(5) 8 Ch. D. 535.
(6) 11 Ch. D. 676.
(7) *Ante*, p. 337.
(8) Law Rep. 3 Ch. 769.

bankruptcy are to prevail and be observed, and amongst these rules is the rule as to unpaid servants. In bankruptcy servants had priority to the extent of £50, and it appears to me that it must have been the intention of the Legislature to extend this rule to windings up. It is an obvious act of justice, and it is monstrous to suppose that the Legislature could have intended the servants of a company to be left utterly destitute when that is not the rule in bankruptcy, and the Legislature has said that the same rules as to unsecured creditors are to prevail in windings up.

As to authority, there is no case exactly in point, except *In re Norton Ironworks Company* (1), and that is distinctly in favour of the claim. The Master of the Rolls had the point distinctly before him, and if the Act applies to one class it applies to all. *In re Albion Steel and Wire Company* (2) was only two months later, and his Lordship's attention does not seem to have then been called to the former case, and his decision seems quite inconsistent with it. Then came *In re Printing and Numerical Registering Company* (3), in which he had to discuss the case of *In re Albion Steel and Wire Company*, and he seemed to have doubted whether it was right. Therefore, so far as there is authority, I must consider that the Master of the Rolls has taken my view.

The Act ought, in my opinion, to have a liberal interpretation, and ought to be applied to such persons as clerks and servants. Whatever other Judges may have felt, I feel no doubt about it. The Respondents must have their costs.

Solicitors for Liquidator: *Winter, Williams, & Co.*
Solicitor for clerks: *John Cotton.*

(1) 26 W. R. 53. (2) 7 Ch. D. 547.
(3) 8 Ch. D. 535.

V.-C. M.
1881
Jan. 21.

SHIPWAY *v.* BALL.

[1859 S. 203.]

Married Infant—Consent—Waiver of Equity.

A fund in Court belonging to an infant married woman will not be paid out to her husband, as she cannot waive her equity to a settlement.
In re D'Angibau (1) noticed.

A WARD of Court, aged seventeen, who was entitled to £560 Consols in Court, had married with the consent of her mother, but without any application to the Court. She and her husband now applied for payment of the money to the husband.

Freeman, in support of the petition, read affidavits that though the mother and the husband were aware that the infant was entitled to this money they were not aware that they ought to have applied to the Court to approve of the marriage.

MALINS, V.C., thought that the contempt of Court might be disregarded, but doubted whether the money could be paid out, and whether the wife, being a minor, could waive her equity to a settlement.

Freeman referred to *In re D'Angibau* (1).

Bristowe, Q.C. (*amicus curiæ*), referred to *Stubbs* v. *Sargon* (2), and *Abraham* v. *Newcombe* (3).

MALINS, V.C.:—

I cannot take the consent of a minor, and these cases entirely confirm my view that a minor, married or not married, cannot dispose of her property. I concur with Lord Justice *Cotton*, but of course I am bound by the decision of the majority of the Lords

(1) 15 Ch. D. 228.
(2) 2 Beav. 496.
(3) 12 Sim. 566.

Justices of Appeal in *In re D'Angibau* (1), and in the case of an appointment I should follow it.

I cannot give the principal to the husband, but I make an order for payment of the dividends to the separate use of the wife until further order. The costs may be paid out of the dividends, but not out of the capital.

Solicitors: *Newman, Stretton, & Hilliard.*

(1) 15 Ch. D. 228.

V.-C. B.

1881

Jan. 14, 15,

CHATTERTON *v.* WATNEY.

[1880 C. 0388.]

Judgment Creditor—Garnishee Order—Mortgagor-Debtor of Judgment Debtor—Right of Holder of Garnishee Order against Proceeds of Sale of Mortgaged Estate—Rules of Court, 1875, *Order* XLV., *rr.* 2, 3.

A judgment creditor who has obtained a garnishee order against a mortgagor-debtor of his debtor, is not entitled to the surplus proceeds of the mortgaged estate, when sold by a prior mortgagee, under his power of sale—the sale having taken place after the date of the garnishee order.

But the holder of a garnishee order against the first mortgagee, such order having been obtained after the sale, is entitled to attach the surplus proceeds of sale in the hands of the first mortgagee.

Affirmed on appl 19 Ch D 257 Ca

ADJOURNED SUMMONS.

On the 13th of December, 1877, a leasehold interest in a public-house and hereditaments, called the *Greyhound*, at *Croydon*, was mortgaged by *Harry Frank Margetts*, first to *Watney & Co.*, brewers, then to *Vickers & Co.*, distillers, and thirdly, to *James Pearce Budden*, the vendor, all on the same day. *Budden's* mortgage was for £6000 and interest. The ultimate trust of the proceeds of sale under the power in *Watney & Co.'s* mortgage was for the mortgagor, "his executors, administrators, and assigns."

In June, 1879, an action was commenced by *Robert Rogers* against *Budden*, and on the 28th of July, 1879, judgment was recovered in the action for £1081 0*s.* 8*d.* debt and £4 11*s.* costs.

On the 1st of August, 1879, *Rogers* obtained an order *nisi* attaching all debts "owing or accruing due" from *Margetts*, as garnishee, to *Budden*, the judgment debtor, to answer the judgment of the 28th of July.

On the 8th of August, 1879, the garnishee order *nisi* was made absolute.

On the 13th of November, 1879, *Budden* assigned his mortgage debt of £6000, with the securities, to *Horace Whitehead Chatterton*, by way of sub-mortgage.

On the 11th of February, 1880, the hereditaments were sold by *Watney & Co.*, the first mortgagees, under the power of sale in

their mortgage deed. The sale was completed on the 11th of March, 1880, and out of the proceeds of sale were paid, first, *Watney & Co.'s* debt, and then *Vickers & Co.'s* debt, leaving a surplus of about £1109 7*s.* 2*d.* in the hands of *Watney & Co.*

The writ in the action was issued on the 28th of April, 1880. The writ was amended on the 2nd of June, 1880, and as amended, the action was between *Chatterton* as Plaintiff, and *Watney & Co., Budden, Ind, Coope, & Co., Taylor, Walker, & Co., Rogers,* and *W. J. Grout* (who on the 7th of January, 1880, had been appointed trustee of *Margetts,* under a liquidation petition filed on the 10th of December preceding) as Defendants. The writ was indorsed with a claim for an account of what was due to the Plaintiff under his security, of the moneys that had come into the hands of *Watney & Co.,* of what was due to them at the date of the sale, and of what they had properly paid to *Vickers & Co.;* and that the balance in *Watney & Co.'s* hands, or so much thereof as should be sufficient to satisfy the amount ascertained to be due to the Plaintiff might be paid to him.

The amended claim further was that the priorities of the Defendants, other than *Watney & Co.,* might be ascertained, and the balance, if any, remaining in *Watney & Co.'s* hands paid to the said Defendants according to their priorities.

The Defendants *Ind, Coope, & Co.* were creditors of *Budden,* who, on the 25th of February, 1880, recovered judgment against *Budden* for £317 1*s.* 5*d.,* and who on the 22nd of March, 1880, obtained an order *nisi* attaching all debts due from *Watney & Co.,* garnishees, to *Budden,* to answer the judgment. *Ind, Coope, & Co.* were the first judgment creditors of *Budden,* who obtained a garnishee order against *Watney* after the sale. This order was made absolute on the 10th of May, 1880.

The Defendants *Taylor, Walker, & Co.* were judgment creditors of *Budden,* who had obtained an order *nisi* against *Margetts* as garnishee, on the 16th of October, 1879. They claimed priority over *Rogers* on the ground that they had given a regular and effective notice of their claim to *Watney & Co.,* whereas (as they contended) the notice given by *Rogers,* if it reached *Watney & Co.* at all, was given to other than the agent lawfully constituted to receive it, and was subsequent in date to theirs. In the result

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this question, though argued, was not adjudicated upon, owing to the deficiency of the fund.

On the 25th of May, 1880, *Watney & Co.* were ordered to pay the surplus into Court, to the credit of the action; and the question of priorities as between *Chatterton* and the holders of the garnishee orders now came on for decision on adjourned summons.

Sir *H. Jackson*, Q.C., and *A. A. Terrell*, for the Plaintiff *Chatterton*:—

The effect of a garnishee order depends upon Order XLV. of the Rules of Court, 1875. Of that Order, rule 2, which is taken from sect. 61 of the *Common Law Procedure Act* (17 & 18 Vict. c. 125), enables the Court to make an order that "all debts owing or accruing" from the garnishee to the judgment debtor shall be attached to answer the judgment debt; and rule 3, which is taken from sect. 62 of the same Act, provides that service of an order that such debts shall be attached, or notice thereof to the garnishee, shall bind such debts "in his hands." If it had been the fact that the fund in Court represented a debt "due or accruing" from *Margetts* to *Budden* on the 1st of August, 1879, the right of *Rogers*, the holder of the garnishee order, would have been clear. But the fund does not represent a debt, it represents the realization of the sale of the leasehold. What claim can a judgment creditor have against land under a garnishee order? Under the old law a registered judgment would bind the land, but now, by the 27 & 28 Vict. c. 112 (July 29, 1864), s. 1, no judgment affects land until the land has been actually delivered in execution. In this instance, the land, when sold, became converted into money, and was in the hands of the first mortgagee, impressed with a trust, in the first place to pay off successively *Watney & Co.*, *Vickers & Co.*, and *Budden*, and then to hold the surplus (if any) for *Margetts*, the mortgagor. Rules 2 and 3 specify "debts"; but to support the contention of the holder of the garnishee order, the Act must be held to extend not only to securities for debt, but to landed security for debt.

Badnall, for *Ind, Coope, & Co.*:—

As being the first holders of a garnishee order against *Watney*,

after the fund had got into his hands, we support the contention of Sir *H. Jackson.* The holders of garnishee orders against *Margetts* must be excluded. The first moment at which the fund could be attached by a garnishee order was when it reached the hands of *Watney;* for not until that moment could *Budden* have maintained an action for it or any part of it: *Webster* v. *Webster* (1). In *Stevens* v. *Phelips* (2) executors of a debtor were held not affected by a garnishee order.

Horton Smith, Q.C., and *Vernon Smith,* for *Rogers*:—

We hold the earliest garnishee order against *Margetts.* The effect of the garnishee order is thus stated by Lord Justice *James*: "The moment the order of attachment was served upon the garnishee, the property in the debt due from him was absolutely transferred from the judgment debtor to the judgment creditor": *Ex parte Joselyne* (3). If the debt be transferred, the securities for the debt must be transferred with it; and to the extent of *Rogers'* judgment, he stands towards this fund precisely in the position that *Budden* stood with regard to it—that is to say, he is third mortgagee.

In *Emanuel* v. *Bridger* (4) it was decided that the holder of a garnishee order, obtained before the bankruptcy of the debtor, was a "secured creditor" within the meaning of sect. 16, sub-sect. 5, of the *Bankruptcy Act,* 1869.

Vaughan Hawkins, for *Taylor, Walker, & Co.*:—

As against the Plaintiff, I adopt the argument of the Defendant *Rogers.* If the security for the debt be not transferred with the debt itself, by virtue of the garnishee order, what becomes of the security? It is impossible to hold that it remains in the hands of the mortgagee creditor, who is also the judgment debtor. If that were so, there would be a double claim upon the fund; that of the holder of the garnishee order, and that of the mortgagee.

Sir *H. Jackson,* in reply:—

Admitting that the property in the debt was transferred by

(1) 31 Beav. 393, 397.
(2) Law Rep. 10 Ch. 417.
(3) 8 Ch. D. 327, 330.
(4) Law Rep. 9 Q. B. 286.

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force of the order, this fund was not a debt; it was a trust fund and not attachable, any more than the fund in *Stevens* v. *Phelips* (1) was attachable by a garnishee order. The rule says, the order "shall bind such debts in his hands," but does not add "and all securities for the same." In order to decide in favour of the holder of the garnishee order, these words must be read into the rule. A garnishee order is, to use Sir *G. Mellish's* expression, "entirely a process of the Courts of Common Law" (2); and this Court will not extend the words of the rule beyond their actual meaning, or superadd equitable remedies to a remedy strictly defined by the words of a statute.

BACON, V.C.:—

It is agreed on all hands that this is the first time the question raised in this case has been presented to the Court for decision.

The Legislature, in the *Common Law Procedure Act*, thought fit to lay down a principle regulating what are called garnishee orders; and that principle is adopted in the *Judicature Act*. It is perfectly intelligible and clear. Where a man has recovered judgment against his debtor, if he finds that his debtor does not pay him, and has the means of paying him in whole or in part from persons who are indebted to him, the debtor, the statute enacts that the judgment creditor shall have all the rights against the garnishee which the judgment debtor would have had but for the suit which is pending. It is a very reasonable provision—though whether reasonable or not, it is not for me to inquire. In the commercial world, nobody will doubt that it is perfectly reasonable that a man who is able to pay his own debts, if he takes the trouble to collect the debts which are due to him, shall not be permitted to defeat his creditors by neglecting to collect them. Then the statute provides that if the judgment debtor has the means of paying the judgment debt by getting in debts which are due to him, he shall no longer have the power himself of getting in the debts, but they shall be the property of the judgment creditor to the extent of the amount for which he has recovered judgment. That is the substance and effect of the law, and none of the cases which have been referred to bring that

(1) Law Rep. 10 Ch. 417. (2) Law Rep. 10 Ch. 423.

principle in question, or carry it beyond the point I have stated. But then it is most expressly declared that the debt so attached must be a debt owing by the garnishee—a debt of which the judgment debtor could have compelled payment, if he had desired to do so.

Now what are the facts which I have to deal with here? Three successive mortgages are executed on the same day, purporting to secure, by the conveyance by *Margetts* of the property in question, satisfaction of the sums mentioned in the three several securities. The first mortgage contains the usual power of sale, and directs the proceeds of sale, after satisfaction of the debt, to be paid to *Margetts*, "his executors, administrators, and assigns." By the third of the three mortgages, that to *Budden*, *Margetts* effectually disposed of the residue of the proceeds, unless there should be a surplus. By the terms of the mortgage deed to *Budden*, the relation of debtor and creditor was established between *Margetts* and *Budden;* but, in order to meet the view of the statute, the debt to be attached must be not merely a debt which there is a legal right to recover—it must be a debt, the payment of which can be effectually enforced. The third rule of Order XLV. declares that service of the order shall bind "such debts in the hands of" the garnishee. Now, in the events which have happened here, under what state of circumstances can it be said that there ever was a particle of money "in the hands of *Margetts*"? If so, the garnishee order does nothing; it establishes no right beyond a right of the judgment creditor to rank as a creditor of *Margetts*. *Budden*, the judgment debtor, has asserted no right against *Margetts;* but, a sale having taken place, and, there being enough to satisfy the first and second mortgagees, but not enough to satisfy *Budden*, the third mortgagee, the question is, what is to be done with this surplus? It is contended that the garnishee order passes to the judgment creditor the right of *Budden*, the judgment debtor, to this sum. No case that has been cited favours this contention in the slightest degree. The case which seems to come nearest to it is that of *Emanuel* v. *Bridger* (1); but that case, when examined, is found to be of a totally different character. A judgment was recovered against a man named *Bridger*, who

(1) Law Rep. 9 Q. B. 286.

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was found to have owing to him a debt from Mrs. *Roberts*. After judgment recovered, and after the garnishee order made, that is to say, after the debt from Mrs. *Roberts* had become the property of the judgment creditor, *Bridger*, the judgment debtor, proceeded to deal with it in a way which need not be followed very closely. He made a mortgage of the goods which were comprised in a bill of sale given to him by Mrs. *Roberts* to secure repayment of the debt, and he got an advance of £50. The ultimate decision was, that for all beyond the amount to which the judgment creditor had established his right by virtue of the garnishee order, the mortgage was a valid mortgage. But to the extent of the amount of the judgment debt, the debt due to the judgment debtor was held to belong to the judgment creditor. That bears no kind of resemblance to the case before me. Nothing was done by *Budden;* all that was done was done by *Watney*, the first mortgagee. *Budden* was passive throughout. He is entitled to the surplus which remains after payment of the two prior mortgage debts, and this surplus he was perfectly competent to deal with, notwithstanding the garnishee order. I have nothing to do with the consideration of the rights which the judgment might give the judgment creditor against any interest *Budden* may have had in the land, or may have in the proceeds of the land. All I have to consider is, whether, admitting there was a debt according to the terms of the mortgage deed, there ever was anything in the hands of *Margetts* applicable to the payment of that debt. I find it to be the plain, distinct fact that there was not. *Budden* was entitled to the surplus to the extent of his debt, and *Margetts* was entitled to nothing whatever, unless enough should be produced to satisfy the mortgage debts. Then what part of this property was there ever in the hands of *Margetts?* That *Margetts* owed *Budden* a debt is true. Order XLV. says, "You, the judgment creditor, may get that money from *Margetts* if you can; if it is in his hands, you are entitled to it;" but it does not say that these three mortgages shall be undone. It does not make the state of the law as to mortgages so uncertain, as that a man who takes a mortgage one day may find it defeated the next, because he owed money to somebody, and his creditor has obtained a garnishee order against his mortgagor.

The question is a curious and nice one, but I may dispose of it at once by saying that, in my opinion, the garnishee order has no application to, and no operation upon, the surplus proceeds which remain after satisfying the first two mortgages, and that they belong to *Budden*, although a judgment had been recovered against him. *Budden* was not on that account precluded from assigning his interest to anybody. He has assigned it to the Plaintiff *Chatterton*, and, in my opinion, the Plaintiff has a claim preferable to that of the holder of the garnishee order, and is entitled to be paid out of the surplus as much as will satisfy his debt, if there be enough; if not, he will take the whole.

Badnall, for *Ind, Coope, & Co.*:—

We claim to be the next incumbrancers, supposing there to be a surplus.

Horton Smith, Q.C., for *Rogers*:—

The Court has decided that the garnishee order is valueless as against the fund.

BACON, V.C.:—

In my opinion the garnishee order obtained by *Rogers* against *Margetts* did not touch the fund which is to be distributed; but I think the garnishee order which was obtained against *Watney* did touch it. Consequently, Mr. *Badnall's* clients come next to the Plaintiff; and in this event it is unnecessary to go into the question of priorities which has been raised between Mr. *Horton Smith's* and Mr. *Vaughan Hawkins's* clients.

Cozens-Hardy, for *Watney & Co.*:—

We ask to be paid our costs of the action and of the garnishee summons, and to be dismissed. As trustees we claim costs as between solicitor and client.

Sir *H. Jackson*, Q.C.:—

Without admitting *Watney & Co.'s* application as a matter of right, we elect to pay them their costs and have the proceedings

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stayed against them. But as stakeholders, they are entitled only to party and party costs.

BACON, V.C., said it was not a case in which a distinction should be made between solicitor and client costs and party and party costs; and ordered that the Defendants *Watney & Co.* should be paid their party and party costs of the action and summons, and have the proceedings stayed against them; declared the Plaintiff to be the first incumbrancer on the fund, and *Ind, Coope, & Co.* to be second; and ordered accounts and payment accordingly; the holders of the garnishee orders to be allowed to add their costs to their securities.

Horton Smith, Q.C., stating that *Rogers* was, in addition to his other claim, a fourth mortgagee from *Margetts* of the property, liberty was given to him to apply.

HIS LORDSHIP remarked on the inconvenience occasioned by the common form in which garnishee orders *nisi* were drawn up. Mention was made in them of "the said garnishee," when the name of the garnishee had not been before stated.

Solicitors: *H. W. Chatterton; H. Tyrrell; Peacock & Goddard; Gellatly, Son, & Warton; Pownall, Son, Cross, & Knott.*

SEAR *v.* HOUSE PROPERTY AND INVESTMENT SOCIETY.

V.-C. H.
1880
Nov. 29.

[1880 S. 2481.]

Lessor and Lessee—Covenant not to Assign or Underlease without Consent—Unreasonable Refusal—Qualification of Covenant.

A lessee, in a lease of a house and premises to him for twenty-one years, covenanted with the lessor, his executors, &c., that he would not carry or suffer to be carried on any other business upon the premises than that of a grocer and tea-dealer without the previous consent in writing of the lessor, his executors, &c., and that he, his executors and permitted assigns, should not assign or underlease the premises without the like previous consent in writing, "but such consent not to be unreasonably withheld," and on the granting of such consent the lessee should pay a certain fee for the preparation of it, and give notice of any assignment to the lessor.

The premises were afterwards conveyed by the lessor, subject to the lease. The lessee applied for the necessary consent to enable him to mortgage the premises by way of underlease, and it was refused.

On demurrer to an action for an injunction, and for specific performance of the covenant, or for damages:—

Held, that the words "but such consent not to be unreasonably withheld" did not amount to a contract on the part of the lessor, but were a qualification of the covenant by the lessee.

Treloar v. *Bigge* (1) followed.

DEMURRER.

The Plaintiff, *Ebenezer Sear*, was a grocer and tea-dealer carrying on business at No. 2, *The Pavement, Rye Lane, Peckham*, and the Defendants were a company registered under the Companies Acts, 1862 and 1867, and had become the owners of the property.

By an indenture dated in July, 1879, and made between *William Nunn* of the one part and the Plaintiff of the other, the house and premises known by the description above mentioned were demised by *William Nunn* to the Plaintiff, his executors, administrators, and assigns, from September, 1877, for the term of twenty-one years, determinable at the periods therein mentioned, at the yearly rent of £89 5*s.*, and subject to the lessee's covenants therein expressed. The Plaintiff covenanted with *William Nunn*, his executors, administrators, and assigns, that he, his executors,

(1) Law Rep. 9 Ex. 151.

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administrators, and assigns, would not carry on or suffer to be carried on any other business in or upon the premises than that of a grocer and tea-dealer (including the sale of wines and spirits), without the previous consent in writing of *William Nunn*, his executors, administrators, or assigns, for that purpose first had and obtained, and that he, his executors, administrators, and permitted assigns, should not assign or underlease the premises, or any part thereof, without the like previous consent in writing, but such consent not to be unreasonably withheld, and on the granting of such consent he, his executors, administrators, or assigns, should pay to the solicitor of *William Nunn*, his executors, administrators, or assigns, a fee of two guineas for the preparation of such consent, and also that he, his executors, administrators, or assigns, should and would, within one calendar month after any assignment or underlease by him or them, or his or their underlessees of the premises, or any part thereof, give notice in writing to *William Nunn*, his executors, administrators, and assigns, or his or their solicitor or agent of such assignment or underlease, and the nature and object thereof, and of the name and place of abode of the assignee or underlessee.

Before July, 1880, the premises were conveyed by *William Nunn* to the Defendants, subject to the Plaintiff's lease, of which the Defendants had previous notice.

On the 20th of July, 1880, the Plaintiff, being indebted to his father in various sums of money, was desirous of securing the same to him by a mortgage of the premises by way of underlease, and he applied to the Defendants, in accordance with the covenant, for the necessary license. It was alleged that the father was a responsible and respectable person, that no reasonable objection could possibly be made to the underlease to him, and that none had, in fact, been made.

The Defendants, however, had unreasonably withheld the license, although frequently applied to on behalf of the Plaintiff to grant it; and although he had offered to pay the fee of two guineas to their solicitor for the same, the license had been unreasonably withheld by them solely for the purpose of causing vexation and embarrassment to the Plaintiff, and in order to gratify a feeling of spite and revenge towards him on the part of *William Nunn* and his solicitor.

The Plaintiff alleged that he had done all things necessary to entitle him to the relief which he claimed, and that he had, owing to the license being unreasonably withheld, incurred considerable legal and other expenses, and had been put to great loss and inconvenience; and he claimed an injunction against the Defendants from withholding their consent in writing to the proposed underlease, and an order on them to give such consent in accordance with the covenant, and to have such covenant specifically performed; or, if the Court should not think fit to grant such relief, damages for the unreasonable withholding of the consent; or in any event damages for the loss occasioned to the Plaintiff by the Defendants' breach of the covenant; and costs of the action.

The Defendants demurred to the statement of claim as being bad in law, on the ground that it shewed no covenant or contract binding them to grant the license claimed by the Plaintiff.

Hastings, Q.C., and *W. H. Gover*, for the Defendants:—

The question is whether there was such a covenant on the part of the lessor or not, and, if so, whether the consent had been unreasonably withheld. It is submitted that the words "but such consent not to be unreasonably withheld" do not amount to a contract on the part of the lessor, but are merely a qualification of the lessee's previous contract. The position of the words in the middle of the covenant and the use of the word "but" point to this conclusion. The case is substantially undistinguishable from that of *Treloar* v. *Bigge* (1), where the words were, "but such consent is not to be arbitrarily withheld." There Baron *Amphlett* said, "Now, looking at the place in which the words relied on occur, I think they ought to be construed as a qualification on the covenant of the lessee," and that "the true interpretation of the words, I think, is to release the plaintiff from his covenant not to assign without the defendant's assent if that assent is arbitrarily withheld." So here, the natural meaning of the words is that they are a qualification of the previous covenant by the lessee, and if the consent should be unreasonably withheld, he might assign without any consent, and in any action for a breach of the covenant it would be a sufficient answer to say that the consent was

(1) Law Rep. 9 Ex. 151.

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unreasonably withheld. This is the most reasonable and grammatical construction of the language, and therefore the demurrer should, it is submitted, be allowed.

[They also referred to *Hyde* v. *Warden* (1) and *Woodfall* on Landlord and Tenant (2).]

W. Pearson, Q.C., and *Northmore Lawrence*, for the Plaintiff:—

The question is, has the lessor not agreed by an instrument under seal and executed by him, that he would not unreasonably withhold his consent to an assignment or underlease of the premises? As to what will amount to a covenant may be seen in the case of *Brookes* v. *Drysdale* (3). That is an authority for saying that a proviso similar to that in this lease will be construed as a covenant.

The case of *Treloar* v. *Bigge* (4) is distinguishable from this one, as there was a proviso for re-entry immediately after the words "such consent not being arbitrarily withheld," and similar words were also inserted in the proviso. The Chief Baron said: "It is quite possible that if the words there used and on which reliance is placed had been used in another part of the deed, they might have been properly construed as amounting to a covenant." As to *Hyde* v. *Warden*, that was the case of an action upon an agreement to grant an underlease, and the question decided was one of title as between the lessor and lessee. Here the language amounts to this, that the lessor will give his consent to an assignment. It is an agreement by him that he will not unreasonably withhold it. There is a distinct averment that his agreement has been broken, and therefore the Plaintiff should be held entitled to the relief which he claims.

[They also referred to the examples given in *Sheppard's* Touchstone (5), and to *Lehmann* v. *McArthur* (6).]

Hastings, in reply, referred to *Smith* v. *Corporation of Harwich* (7).

(1) 3 Ex. D. 72, 74, 81.
(2) 11th Ed. p. 616.
(3) 3 C. P. D. 53.
(4) Law Rep. 9 Ex. 151.
(5) Page 162.
(6) Law Rep. 3 Ch. 496.
(7) 2 C. B. (N.S.) 651.

HALL, V.C.:—

The question is one of construction of the language of the deed. Do the words contained in the clause, "but such consent not to be unreasonably withheld," amount to a contract upon the part of the lessor that he will not unreasonably withhold his consent, or do they merely amount to a qualification of the covenant in which they are found, and which was entered into by the lessee, so that if the consent be unreasonably withheld, the lessee assigning does not break his covenant? If I were to decide the question quite irrespective of authority, I should say that a fair reading of the covenant would be that the words referred to merely qualify the obligation contained in the clause itself—that the lessee would not assign without consent. The words are inserted in the lessee's covenant, and they are put in a form which looks more like a qualification than a contract, "but such consent not to be unreasonably withheld." If it were unreasonably withheld he would say, "I am not under any obligation to perform the covenant." I adopt the judgment given in the case of *Treloar* v. *Bigge* (1). Baron *Amphlett's* judgment applies to this case.

The examples which have been cited from *Sheppard's* Touchstone are quite consistent with the view I have adopted. One example mentioned was that "the lessee shall repair, provided that the lessor shall allow timber." That is an affirmative covenant: it is manifest that the lessee could not repair without timber, and it is natural that there should be a contract or arrangement to repair—that the one would find the timber and the other make the repairs. The next example was, "That the lessee shall scour ditches, provided always that the lessor do carry away the earth." It would be hard upon the lessee to leave the scourings on the ground, the landlord not being obliged to remove them, and the words, therefore, to do justice between the parties, were construed as a contract on the part of the landlord. There is no magic in the words "provided always." They were construed as part of the contract. The other example was, "And if a lease be made of houses by patent to *L. S.* for twenty-one years, and therein is inserted this clause, and that the said *L. S.* and his assigns shall repair the houses when they shall be decayed; this

(1) Law Rep. 9 Ex. 151.

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is a good covenant." That is an example which clearly requires that the express words be held to be words of covenant. The writer proceeds: "And so also it is where these or the like words be inserted amongst other covenants, and that the lessee shall pay 1*s.* a year rent, or that the lessee shall not alien; these shall be said to be covenants unless it be in such cases where there is some other means to enforce the doing of the thing."

In this case I consider that the convenient construction is that the words be construed as not being in themselves a covenant to be enforced by damages, but as leaving the lessee to deal with the premises without restriction if the license of the lessor for permission to assign to a responsible and respectable tenant be unreasonably withheld. I hold, therefore, that there is not in these words any covenant on the part of the lessor to give his consent, and that, as the foundation for the action fails, the demurrer must be allowed.

Solicitors: *S. S. Seal; H. Gover & Co.*

COCKBURN *v.* EDWARDS.

FRY, J.

1880

Dec. 1.

[1880 C. 127.]

Fiduciary Relation—Solicitor and Client—Improper Sale—Measure of Damage —Costs as between Solicitor and Client.

The Defendant (who was the Plaintiff's solicitor) improperly sold the Plaintiff's property without giving him notice of the sale, and a decree was made against the solicitor directing him to pay damages and costs:—

Held, that the damages ought to include the difference between the Plaintiff's solicitor and client costs and the party and party costs which he could get under the order for costs.

THE Plaintiff, who was seised in fee simple of hereditaments in *Ramsgate*, employed the Defendant, who was his solicitor in 1872, to procure him money on mortgage thereof.

The Defendant accordingly negotiated a first mortgage of the Plaintiff's hereditaments to *Charles Chapman* for £450, and a second mortgage to himself for £50.

The second mortgage to the Defendant, which was prepared by himself, contained a power of sale, without the usual provision that the power should not be exercised except in default of payment of principal or interest.

In 1878 the Defendant, without notice to the Plaintiff, sold the mortgaged hereditaments under the power contained in the second mortgage for £630.

The Court decided upon the evidence that there was no proof that the Plaintiff had had the peculiarity of the form of the power of sale in the mortgage to the Defendant properly explained to him, and that the Plaintiff was therefore entitled to recover from the Defendant such damage as he had sustained from the improper act of the Defendant.

The evidence shewed that £630 was not an inadequate price at the date of the sale in 1878.

Cookson, Q.C., and *W. Barber*, for the Plaintiff.

North, Q.C., and *Bardswell*, for the Defendant.

W. Barber was heard in reply on the measure of damages.

FRY, J.

1880

COCKBURN v. EDWARDS.

FRY, J.:—

The Defendant having sold the Plaintiff's house improperly, but not, as it appears to me, at an undervalue, the question arises what is the proper measure of the damages to be recovered by the Plaintiff. I have come to the conclusion that the damages should include, first, such costs as the Plaintiff has been put to by reason of the sale made without his knowledge by the Defendant; secondly, a sum, which I must estimate, to cover the costs which the Plaintiff would now be put to in making a new investment of the £630 in property of a similar description to that which was sold; thirdly, a sum to represent the probable prospective increase of value of the hereditaments since the time of sale to the present time. I found my decision upon this point upon the cases which have been decided with reference to compensation for railway accidents. Thus the probable increase of income was taken into account in *Fair* v. *London and North Western Railway Company* (1), cited in Mr. *Saunder's* book upon Negligence (2). Fourthly, I declare the Plaintiff entitled, by way of damages, to the difference between the solicitor and client costs which he has incurred in these proceedings, and the party and party costs which he will recover from the Defendant as such. The Defendant will pay £80 for damages under the first three heads, and the costs of the action.

Solicitors for Plaintiff: *Van Sandau & Cumming.*
Solicitors for Defendant: *F. Venn & Son.*

(1) 21 L. T. (N.S.) 326. (2) Page 253.

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[1880 P. 0154.]

Specific Performance—Agreement contained in several Documents—Failure to prove one of the Documents—Literary Work—Misstatement as to Authorship—Fraud on Public.

The Plaintiffs claimed the specific performance of an agreement for the composition of a literary work by the Defendant, alleging that the agreement was contained in three written documents. At the trial the first and third of the documents were proved; the second was not produced, nor was any evidence given of its contents. The Defendant, by his statement of defence, denied that he had agreed with the Plaintiffs, as alleged by them with reference to the second document:—

Held, that the Plaintiffs were not entitled to specific performance of the agreement contained in the first and third documents, or to damages for the breach of it.

The Plaintiffs alleged that the Defendant had agreed that his name should not appear on the title-page of the work as the author of it; the Defendant alleged that it was part of the agreement that his name should so appear. The Plaintiffs proposed to publish the book with a title-page, stating that it was "Edited by *K.* (assisted by *M.* (the Defendant))." *K.* was known as having published other books of a similar description, and had allowed the Plaintiffs to make use of his name, but he had taken no part whatever in the compilation:—

Held, that the proposed title-page would be a fraud on the public, and that on this ground also the Plaintiffs were disentitled to relief.

THIS was an action for the specific performance of an agreement in relation to the composition of a literary work. The Plaintiffs were *A. A. Post* and *B. F. Stevens;* the Defendant was *J. B. Marsh.* The Plaintiffs were Americans.

The statement of claim alleged that prior to the year 1878 the Plaintiff *Post* projected a plan of an illustrated guide-book to towns, and communicated the same to one *D. J. Kenny*, who subsequently adopted the same for various places in *America*, and that such guide-books had become known in *America* and elsewhere as "*Kenny's Guide Books*"; that in the beginning of the year 1878 the Plaintiff *Post* proposed to publish a similar illustrated guide to *London*, and applied to, and obtained authority from, *Kenny* to publish the same under the name of "*Kenny's Illustrated London.*"

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The statement of claim alleged (par. 3) that, "On or about the 20th of March, 1878, the Defendant, in consideration of the sum of £200 to be paid to him by the Plaintiff *Post*, agreed with the Plaintiff *Post* to edit and prepare for him the letterpress of the proposed guide to *London;* and the Defendant also agreed to release all claim to copyright in the said guide-book, and not to require his own name to appear as author on the title-page of the said guide."

On the 20th of March, 1878, a written memorandum was signed by *Post* in the following terms:—

"I hereby engage the services of Mr. *J. B. Marsh*, of *London*, to perform editorial work upon "*Illustrated London*," the said *Marsh* assuming all the preparation of the letterpress, to be paid therefor the sum of £200, of which £20 are to be paid on or before the 23rd instant, and £7 weekly thereafter until the work is completed, whereupon all balance due is to be paid said *Marsh*, the said *Marsh* releasing all claim to copyright in the said work."

The statement of claim further alleged (par. 4): "On or about the 14th of November, 1879, the Plaintiff *Post* entered into an agreement with certain persons [called a syndicate] who had furnished him with money and materials for the preparation of the said work, whereby it was agreed that the same persons should, jointly with the Plaintiff *Post*, be proprietors of the said work, and that the rights of the Plaintiff *Post*, under his agreement with the Defendant and otherwise, in relation to the said guide, should be vested in the Plaintiff *Stevens* as trustee for such proprietors, including the Plaintiff *Post*."

(Par. 5.) "The said last-mentioned agreement was communicated to the Defendant, and he, on the 14th of November, 1879, and the 19th of January, 1880, at the request of the Plaintiffs, agreed with the Plaintiffs in writing that he would continue and complete the said work, and would assign the copyright thereof to the Plaintiff *Stevens*, as such trustee as aforesaid, and hold all author's rights in the said work subject to the disposition of the Plaintiff *Stevens*."

It was further alleged that the work had been completed by the Defendant, and that a portion of the manuscript had been already

delivered to *Stevens*, but that the Defendant refused to deliver to either of the Plaintiffs the remainder of the manuscript unless his name was allowed to appear on the title-page of the guide as one of the joint authors thereof, and that the Defendant refused to assign the copyright to the Plaintiffs.

The Plaintiffs alleged (par. 7) that they had offered to allow the name of the Defendant to appear on the title-page as assisting *Kenny* in the editorship thereof, but that the Defendant had declined that offer and insisted on his name appearing as one of the joint authors of the book. The Plaintiffs also alleged that the whole £200 had been paid by them to the Defendant.

The Plaintiffs claimed an order that the Defendant should specifically perform his agreement of the 20th of March, 1878, as modified by the agreements of the 14th of November, 1879, and the 19th of January, 1880, by delivering up to *Stevens* the manuscript of "*Kenny's Illustrated London*," and by doing all acts necessary to vest the copyright of the work in *Stevens;* an injunction to restrain the Defendant from parting with or publishing, or otherwise dealing with, the work or the copyright thereof, without the Plaintiffs' consent; damages for breach of the agreement; and the costs of the action.

By his statement of defence the Defendant said that in March, 1878, prior to the written memorandum of the 20th of March, it was verbally agreed between him and *Post* that, in consideration of £200 to be paid to him, the Defendant should write an original guide-book for *London*, and that his name should appear on the title-page as the author of the book, and that he should assign the copyright of the book to *Post*. But throughout the conversation in which the agreement was come to, no mention was made of the name of *Kenny*, nor was the Defendant informed or aware that *Kenny* was in any way connected with or interested in the guide-book. The Defendant said that he proceeded with the preparation of the book, and that in December, 1879, *Post* told him that he was in treaty with certain persons to take up the book, and asked the Defendant to complete the work. The Defendant agreed to do so, and on the 19th of January, 1880, he saw the persons referred to in paragraph 4 of the statement of claim, together with the Plaintiffs, when he agreed to complete

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the book if the terms of the agreement entered into between himself and *Post* were carried out, and he particularly insisted that his name must appear on the title-page as the author of the book. The Plaintiffs ultimately, in March, 1880, caused the title-page of the book to be printed in what is called in the trade a "dummy" copy, *i.e.*, a copy circulated among tradesmen for the purpose of obtaining advertisements, as follows:—

"*Kenny's Illustrated London,*
"A profusely illustrated
"Guide to the Metropolis of the World,
"Describing its History, Architecture, Business, and Commerce,
"By *D. J. Kenny* (assisted by *John B. Marsh*), author of '*Kenny's Illustrated Cincinnati*,' '*Kenny's Illustrated Exposition Guide*,' '*Kenny's Illustrated New York*,' &c."

As soon as the Defendant discovered this he wrote to *Stevens*, stating that he would not agree to the book being published with the title-page in that form. The Defendant said that *Kenny* had had no part whatever in the compilation of the book, and that he himself had not assisted *Kenny* in the editorship thereof, but that the whole had been done solely by the Defendant and persons working under his direction. The Defendant submitted that the title-page, as proposed by the Plaintiffs, was untrue and calculated to deceive the public, and that no relief ought to be given to the Plaintiffs whereby they could carry out such a deception. The Defendant denied that he ever entered into any agreement whereby his name should not appear as the author of the book, as in fact he was. He said that he did not know the nature or terms of the agreement mentioned in paragraph 4 of the statement of claim, and he denied that that agreement had ever been communicated to him. He denied that he agreed with the Plaintiffs in writing in the manner stated in paragraph 5 of the statement of claim.

At the trial the agreements of the 20th of March, 1878, and the 19th of January, 1880, were proved, but the alleged agreement of the 14th of November, 1879, between the Plaintiffs and the Defendant, was not produced, nor was any secondary evidence given of its contents. It was admitted that *Kenny* had in fact taken no

part whatever in the compilation of the guide-book. It appeared that the Plaintiffs had been advised by counsel that they could properly adopt the form of title-page to which the Defendant objected.

The effect of the rest of the evidence is stated in the judgment of the Court.

North, Q.C., and *W. N. Lawson*, for the Plaintiffs:—

The Plaintiffs are entitled to the relief which they ask.

[FRY, J.:—I feel a great difficulty, inasmuch as the proposed title-page seems to be a fraud on the public. The jurisdiction to enforce specific performance is a discretionary one. I see no objection to calling the book "*Kenny's Illustrated London*, edited by *Marsh*," because it is one of a series. But to say that the book is written or edited by *Kenny* appears to me to be a false statement and a fraud on the public.]

This is not a *bonâ fide* defence, for the Defendant himself was willing to allow his name to appear as joint editor with *Kenny*. We are at any rate entitled to damages for the breach of the agreement.

[FRY, J.:—Are you willing to put on the title-page "Edited by *Marsh*," and to pay the costs of the action?]

The Defendant has agreed to assign to us the author's rights, and we are entitled to have the manuscript to publish without his name.

Cookson, Q.C., and *Dundas Gardiner*, for the Defendant:—

There are two fatal objections to giving the relief claimed: (1.) The Plaintiffs rely in their pleading on three written agreements, and the second of those agreements they have not put in, nor have they attempted to account for its absence or to give secondary evidence of its contents. The contract between the parties has not been shewn to the Court, and therefore no breach of it can be assigned. This is a fatal objection to giving either specific performance or damages.

(2.) The title-page on which the Plaintiffs insist would be a fraud on the public, and on this ground the Court will not assist

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the Plaintiffs. This point is distinctly raised in the statement of defence. The Court will protect the public from a literary fraud.

[FRY, J.:—Can you keep the Plaintiffs' money and not give them the manuscript? I can see nothing unrighteous in the original bargain. The unrighteousness only arises out of the bargain with the advertisers. But if they do not insist on their bargain, does not the original righteous agreement between the Plaintiffs and the Defendant come into force again?]

The Plaintiffs, by their pleading, insist on the unrighteous bargain, and they cannot alter their case now.

North, in reply:—

The document of the 14th of November, 1879, not having been proved by either side, and its effect as stated by the Plaintiffs being denied by the Defendant, may be treated as if it had never been mentioned at all, and specific performance can be given of the agreement contained in the other two documents. It was in our notice to produce, and the Defendant has not produced it. We cannot give secondary evidence of it because it was not stamped. We do not ask specific performance of that agreement, and the Defendant has not suggested that it in any way modifies the agreement contained in the other two documents. If the Plaintiffs are to be believed the Court knows the effect of the agreement of November; if the Defendant is to be believed there was no such agreement. Either way the Plaintiffs are entitled to specific performance.

As to the other point, we do not ask the Court to enable us to commit a fraud on the public. We have now no intention of doing that which was at one time contemplated, and we are ready to give an undertaking to that effect. We have never yet published the title-page which is objected to.

[FRY, J.:—By your statement of claim you insist on the right to use such a title-page.]

We do not now. The real difficulty is that the Defendant has always insisted on his name appearing on the title-page. We are entitled to specific performance of the original agreement as

modified by the agreement of January, 1880, or, if not, to damages for the breach of it.

FRY, J.:—

The Plaintiffs in this action sue for the specific performance of three agreements, dated respectively the 20th of March, 1878, the 14th of November, 1870, and the 19th of January, 1880, pleading that the latter two are modifications of the former, and, in the event of the Court not granting specific performance, they ask for damages for breach of the agreements.

The history of the case is shortly this. In the year 1878 the Plaintiff *Post* had a scheme for publishing a guide to *London*, and he was recommended to see the Defendant, as being a person conversant with such matters and likely to help him. Interviews took place between them, and the result of a portion, at any rate, of their negotiations is comprised in the agreement of the 20th of March, 1878, which was signed by Mr. *Post*. [His Lordship read the agreement.] There is a considerable controversy between the parties as to what took place at the interview on that day. The Plaintiff *Post* alleges that his intention that Mr. *Kenny's* name should be used in the publication was made known to the Defendant. Mr. *Kenny* is an American gentleman who has published one guide in *America* and has had many schemes for the publication of other guides, and it appears that he has a particular plan which he pursues in his guides; and Mr. *Post* says it was stipulated by him that this guide to *London* should be on the principle of *Kenny's* guides. The Defendant says that nothing of the kind took place, and that *Kenny's* name was not mentioned. The Plaintiff *Post* says it was agreed that he should have the absolute control over the manuscript, and should be at liberty to publish it under his own name or *Kenny's* name, or any other name, as the author. The Defendant says that was not so, but that, as he himself was an author of some repute in works of this description, and as he had never published any original work without his name appearing, he stipulated that his name should appear on the book when published. These are the main facts in controversy between the Plaintiff, Mr. *Post*, and the Defendant with regard to that interview.

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I have come to the conclusion that the Defendant's story is the more accurate of the two, and in so doing I am not a little influenced by comparing the memorandum which I have just read with the statements of the parties respectively. It appears to me that if, as the Plaintiff *Post* says, a form of solicitation for advertisements which contained *Kenny's* name had been shewn to the Defendant at that time, and if the parties were contracting for a work which was to bear *Kenny's* name, it is highly probable, nay, almost inevitable, that *Kenny's* name would have appeared in the memorandum, whereas in it the work is described simply as "*Illustrated London*," and not as "*Kenny's Illustrated London*." I further think that in all probability the terms of that memorandum, which was signed by Mr. *Post*, emanated from Mr. *Post* himself. I observe certain peculiarities of expression, particularly one short expression, and also spelling, which indicate to my mind the transatlantic origin of the document. Therefore I attribute that instrument to Mr. *Post* himself, and I think that, if he had stipulated with the Defendant to contribute to "*Kenny's Illustrated London*," he would have said so.

Coming, as I do, to this conclusion with regard to that one point which is in dispute between the parties, I am inclined also to adopt the Defendant's story with regard to the interview generally, and to believe that he did stipulate that his name should appear upon the work when it was published.

Matters went on in this way, and some four or five or six weeks after that interview the Plaintiff *Post* appears to have shewn the Defendant certain pieces of paper which had been used for the purpose of obtaining advertisements, and which contained the description "*Kenny's Illustrated London*," and, according to the Defendant's account, which, again, I am inclined to adopt, he remonstrated against *Kenny's* name being used, and insisted that the title-page should be completed and submitted to him. It appears that after this, and before November, 1879, what is called a syndicate had been formed between various tradesmen who are interested in the bringing out of various publications, for the purpose of bringing out this work, and on the 14th of November of that year they entered into an agreement between themselves, and, according to the Plaintiffs' story, an agreement was also on

the same day signed by the Defendant by which in some way or other he gave his adhesion to the new scheme of publication by the syndicate. That agreement, however, has not been produced. According to the Plaintiff *Post's* evidence it was in the hands of the Defendant on the 19th of January of this year, and according to the evidence of Mr. *Stevens* it was not an unimportant document, because he said it contained recitals of what Mr. *Post* had asked the Defendant to do, and therefore it would throw a material light on the questions in controversy between the parties. To this extent the Defendant does not admit it. The Plaintiff has given him notice to produce it; it has not been produced, and no secondary evidence has been given of its contents; and Mr. *North* declines to rely on it, alleging that he cannot produce it because it is not stamped. So much for what took place in November, 1879. It appears, however, very clearly that in January, 1880, difficulties had arisen between the Defendant and Mr. *Post*. Certain bill transactions had taken place, and Mr. *Marsh* had rendered himself liable upon some bills in which the Plaintiff was interested, and, moreover, a question had arisen between them with regard to the title-page of the book, which question was considered at a meeting of the syndicate which took place on the 19th of January, 1880, at Mr. *Stevens's* office. The Plaintiffs allege that an agreement was then come to that counsel's opinion should be taken, and that that opinion should be binding on all the parties, including the Defendant. The Defendant says that the opinion was taken really in the interests of the syndicate, and that he was not to be bound by it. I have the opinion before me, and I must say that, if I were to judge from it alone, I should rather come to the conclusion that it was taken in the interest of the syndicate only, because what it deals with is the state of their relations with the advertisers and the proposed insertion on the title-page of Mr. *Marsh's* name. To render this intelligible, I ought to state that, while Mr. *Marsh* had been engaged in writing the book, Mr. *Post* and others had been engaged in soliciting advertisements from tradespeople, the scheme apparently being, that tradesmen who are in the habit of advertising largely should be asked to insert their advertisements in this work. In the prospectus sent to these tradesmen the work was described as "*Illustrated London*,

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by *John D. Kenny* (assisted by *John B. Marsh*), author of *Kenny's Illustrated Cincinnati, Kenny's Illustrated Exposition Guide, Kenny's Illustrated New York.*" Mr. *Kenny* is, therefore, apparently a man of large literary attainments, and is well known as the author of certain works, and in connection with the press, and advertisements are sent upon the faith of his authorship. But, unfortunately, that prospectus was entirely delusive. It never was intended that Mr. *Kenny* should be the author of the work, or that he should take an active part in its inception, although it was said that he would come over and superintend it after a certain stage. But he never did so, and he withdrew from the thing entirely. When Mr. *Kenny* had thus withdrawn, having taken no part whatever in it, of course the honest and straightforward thing would have been to have struck his name out altogether. But the syndicate were anxious to retain the advertisements, and they were in this difficulty—If they had struck out *Kenny's* name, and had reduced the title-page to the truth, and had represented the book as either edited or written by Mr. *Marsh*, then they were afraid that the advertisers would be off their bargains, and they should lose all the advertisements.

Accordingly, the conclusion at which I have arrived is that Mr. *Marsh* was not bound by the agreement entered into on that occasion, and I have come to that conclusion, not merely because he denies that he was bound, and because I think the case was advised upon in the interest of the syndicate, but also because the opinion was, as it seems to me, treated by Mr. *Stevens* as not actually binding on him, for he arranged with Mr. *Marsh* for another form of title-page which, so far as I can learn, was not consistent with the truth, as he himself afterwards found out.

Then, early in February, another interview took place between Mr. *Stevens* and Mr. *Marsh*, at which this opinion was shewn to Mr. *Marsh*, and then the new title-page, to which I have referred, was arranged. After that the title-page was printed, and Mr. *Stevens* made certain alterations in it without communicating them to Mr. *Marsh*, and the title-page as so altered stood in this form: "*Kenny's Illustrated London.* A profusely illustrated Guide to the Metropolis of the World, describing its History, Architecture, Business, and Commerce. By *D. J. Kenny* (assisted by *J. B.*

Marsh), author of '*Kenny's Illustrated Cincinnati*,' '*Kenny's Illustrated Exposition*,' '*Kenny's Illustrated New York*,' &c."

Now it appears to me that that is not a truthful title-page, and Mr. *North*, with great propriety, at once said that he should not insist upon it. But that is not the way in which the statement of claim was launched. [His Lordship referred to paragraph 7 of the statement of claim.] That statement is quite correct. The Plaintiffs adhered to that title-page until the case was opened before me, and never offered any modified form or any variation of it till after I had suggested the obvious falsity of such a title-page. These are shortly the facts of the case.

The first question which arises is this: Can the Plaintiffs have judgment for specific performance of the agreements dated the 20th of March, 1878, and the 19th of January, 1880, omitting that of the 14th of November, 1879? In my judgment they cannot. Knowing, as I do, the importance of producing original documents, in order to ascertain what the real rights of the parties are, it appears to me impossible to give the Plaintiffs specific performance of two agreements, when I know that three actually regulate the rights of the parties.

Mr. *North* very ingeniously argued that the Court must either take the statement of the Plaintiffs or the statement of the Defendant; if you take the statement of the Plaintiffs, then you know what the agreement of November was; if you take the statement of the Defendant there was no such agreement at all, and therefore, *quâcunque viâ*, there is an agreement which ought to be specifically performed. I decline to accede to that argument. Often and often, when you come to look at the original written documents, it appears that neither the Plaintiff nor the Defendant has stated the truth of the case. I do not think that the Plaintiffs can come and ask the Court blindly to perform that which they allege to exist, but do not prove when the Defendant puts them to the proof of it.

Then arises the further question, Can the Plaintiffs have damages for the breach of an agreement of this sort when one of the documents which they allege is not produced? I give the same answer to that question. I know from the evidence of Mr. *Stevens* that this suppressed or non-produced agreement contains a recital of

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what took place in March, 1878, and I cannot give damages when the Plaintiffs sue on an agreement which they do not prove.

But this further objection appears to me to lie in the way of the Plaintiffs' success, namely, that they have insisted throughout upon a form of title-page which was not justified. I have already stated that when the book is said to be edited by *Kenny*, who took no part in the editing of it, it is, in my opinion, a falsehood, and therefore a fraud on the public. Even if the Defendant had contracted that he would allow his manuscript to be used in this way, it would not be the less a false statement, but I do not believe he ever so contracted.

Therefore, in my judgment, when the Plaintiffs insisted on that form of title-page, as their own statement of claim says they did, the Defendant was justified in staying his hand and saying, Inasmuch as you are doing that which is not true as regards the public, and which is not consistent with my rights under the agreement, I will not supply you with any further copy. The written agreement, it is true, does not express anything with regard to the Defendant's name appearing on the title-page, but that certainly cannot give the Plaintiffs any right to publish the Defendant's work with a falsehood on the face of it. That being so, it appears to me that the Plaintiffs cannot claim damages, because I think the Defendant was justified in declining to go on under such circumstances. Therefore, in my judgment, that really destroys the whole case of the Plaintiffs.

I repeat that, if it had been shewn that the Defendant had agreed to accept any title-page, whether a true or false one, the case might have stood differently; and for this reason I have carefully investigated all the transactions between the parties.

Some reliance has been placed on what took place at an interview on the 11th of March, which interview merely had for its object the settling of these unfortunate disputes by a reference. I greatly regret that that was not carried into effect, but all that took place then was, in my opinion, with a view to that reference, and failed entirely when the reference fell through.

I hold, therefore, that the Defendant was justified in the course which he pursued.

The result is that I give judgment for the Defendant with the

costs of the action. At the same time it must not be supposed that I hold that the Defendant is necessarily entitled to retain the manuscript and keep the money, if the Plaintiffs are willing to do what is right.

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Solicitor for Plaintiffs: *J. Henry Johnson.*
Solicitors for Defendant: *Carey, Warburton, & De Paula.*

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Dec. 6.

[1880 E. 21.]

Foreign Assets—Foreign Administration—Assets received Abroad—Title of Administrator—Domicil.

The legal personal representative constituted by the forum of domicil of a deceased person is entitled to receive the personal estate of the deceased got in through any letters of administration wherever they may be, and the next of kin cannot make any claim against the estate except through the intervention of such legal personal representative.

Dicta of Lord *Westbury* in *Enohin* v. *Wylie* (1) followed.

22 Ch D 461

Affirmed on appeal 10 Ch D 347 CA

THE Plaintiff in this action was the widow of the Rev. *William Leslie Eames*, who died in the year 1877, and left certain personal estate in *India*.

On the 24th of June, 1877, letters of administration of his estate were granted to the Plaintiff by the Irish Court in *Dublin*, limited "until some will of the said deceased could be found and deposited in the said Court."

Mr. Justice *Fry* assumed, for the purpose of his decision, that *W. L. Eames* had been domiciled in *Ireland*, the Irish Court having thus assumed itself to be the Court of domicil, and all parties having proceeded on that footing.

On the 6th of September, 1878, the Plaintiff executed a power of attorney, by which she authorized Messrs. *Forbes & Co.*, of *Bombay*, to take out letters of administration in her name and as her attorneys. Two of the Messrs. *Forbes* obtained such letters on the 30th of April, 1879, from the Court at *Bombay*, and they

(1) 10 H. L. C. 1. 8 Jur NS. 697

The letters of admon had been sealed in England See 8 & 10 Ch D 347.

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contained a recital that the Messrs. *Forbes* were two of the duly constituted attorneys of *Henrietta Eames*, widow and administratrix in *England* of the personal estate and effects of the Rev. *William Leslie Eames*, and the grant was to the use and for the benefit of *Henrietta Eames*, limited until she should obtain letters of administration to be granted to her. The Messrs. *Forbes* subsequently ascertained the clear residue, and transmitted it to the Defendants as their agents in *England*, and the question between the parties to be determined in this action was, who was entitled to give a receipt to the Defendants as agents of Messrs. *Forbes* for the moneys they had received as part of the personal estate of the deceased *W. L. Eames*.

Mr. Justice *Fry*, on the case being opened, mentioned *Enohin* v. *Wylie* (1).

North, Q.C., and *G. E. Wright*, for the Plaintiffs:—

The Defendants may safely pay to the Plaintiff, who is the proper person to receive Mr. *Eames*' personal assets wheresoever situate: *De La Viesca* v. *Lubbock* (2); *In re Hughes* (3); *Edgar* v. *Reynolds* (4).

Method, for the Defendants:—

The Plaintiff cannot give such a receipt as to protect the Defendants against claims of the next of kin: *Chambers* v. *Bicknell* (5); *Attorney-General* v. *Köhler* (6). In *Enohin* v. *Wylie* the executors abroad had by their conduct submitted to the English jurisdiction, so that the remarks of Lord *Westbury* in that case were not necessary for the judgment, but only *obiter dicta*, and Lord *Cranworth* does not appear to have concurred in them.

FRY, J.:—

The property in question in this action is claimed by the legal personal representative of the intestate who was constituted by the Irish Court, which, for the purposes of this case, I assume to

(1) 10 H. L. C. 1. 8 Jan 1880
(2) 10 Sim. 629.
(3) Law Rep. 3 P. & M. 140.
(4) 4 Drew. 267.
(5) 2 Hare, 536.
(6) 9 H. L. C. 654. 8 Jan 1880

be the forum of the domicil of the deceased. *Primâ facie*, that person is, in my judgment, entitled to receive the moneys belonging to the personal estate of the testator, which represent the clear net receipts obtained in any country wherever it may be, and through the intervention of any letters of administration wheresoever granted. That is a conclusion to which I arrive partly on general principles and partly because they have been very clearly explained in the case of *Enohin* v. *Wylie* (1), to which I have referred. There were pointed out the extreme difficulty and confusion which would arise if every Court in every place where assets might be found undertook the plenary administration of the estate. Lord *Westbury* said (2): "The utmost confusion must arise if, when a testator dies domiciled in one country, the Courts of every other country in which he has personal property should assume the right, first of declaring who is the personal representative, and next of interpreting the will and distributing the personal estate situate within its jurisdiction according to that interpretation. An Englishman dying domiciled in *London* may have personal property in *France, Spain, New York, Belgium*, and *Russia;* and there might be as many different personal representatives of the deceased, and as many varying interpretations of his will, as there were countries in which he was possessed of personal property. It is unnecessary to dwell on the evils which would result from this conflict of jurisdictions. It was to prevent them that the law of the domicil was introduced and adopted by civilized nations." I have already stated that I must assume from what has taken place between the parties, and with no evidence on the point, that Mr. *Eames* died domiciled in *Ireland*, and consequently that the grant of letters of administration there was a grant of letters which would cover the whole clear residue of the personal estate of Mr. *Eames* wheresoever it was found. It has been suggested that the Defendants are liable to pay to Mrs. *Eames* because she is the person for the use and benefit of whom the letters of administration were granted. It does not appear to me that I need consider what might be the question arising between such a person and a person named as the principal in letters of administration, if that person did not fill the character of legal personal

(1) 10 H. L. C. 1. (2) 10 H. L. C. 15.

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representative constituted by the Court of the domicil, because I think in this case both characters concur in one person.

Then it has been suggested that the next of kin are entitled to sue in *India*, and that they are therefore necessary parties to the release to be given. If the judgment of Lord *Westbury* pronounced in the House of Lords be correct, and it appears to me to be the law, it is clear that the next of kin should be remitted to the Court of the domicil, and consequently that instead of *India* being the Court where they should institute their claims they must institute them in *Ireland*, which I assume to be the Court of the domicil.

Then it is said that there are certain authorities which are inconsistent with that view, and I am very much pressed with the authority of the case of *Chambers* v. *Bicknell* (1); that case does not seem to me in any way inconsistent with the view I take, for undoubtedly the assets in one particular jurisdiction are liable to pay the debts of the testator there contracted, and the creditors may maintain against the local administrator an action for that purpose, the clear net residue only being that to which the administrator constituted by the Court of the domicil is entitled, and in *Chambers* v. *Bicknell* all that appears is that the persons entitled as next of kin were allowed to maintain an action against the attorney of the administratrix.

Another case which has been much pressed on my attention is that of the *Attorney-General* v. *Köhler* (2). There administration was taken out in *England* by the nominee of the Crown to property of an officer who died in *Syria*, and the plaintiff, a foreigner, recovered the assets against such nominee in a suit in *England*, but it also appears that throughout *England* was treated as the Court of the domicil, and it further appears that by force of the statute 15 Vict. c. 3, such nominee of the Crown was bound to distribute the assets according to the *Statute of Distributions*. He did not distribute them according to the *Statute of Distributions*, but paid them over to the Crown, and therefore, as the legal personal representative, he was liable to the next of kin. That, it appears to me, is the whole of that case.

I hold, therefore, that the next of kin are not entitled to make

(1) 2 Hare, 536. (2) 9 H. L. C. 654.

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any claim upon this fund except through the intervention of the Irish administratrix, consequently they are not necessary parties to the action, and a valid discharge can be given to the Defendants by the Plaintiff. I must make that declaration and give the costs of the action to the Plaintiff.

It would have been more satisfactory to me if it had been proved that *Ireland* was the Court of the domicil, but as neither party thought fit to do that, I feel bound to act upon the presumption which appears to me to result from the letters of administration.

Solicitors: *J. Wilkinson; Hacon & Turner.*

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[1876 L. 253.]

Company—Mortgage—Priority—Salvage—Statutory Charge—Condition Precedent—"Owner of a Limited Interest in Land"—Special Act—Borrowing Powers—Directory Clauses—Companies Clauses Consolidation Act, 1845 (8 *Vict. c.* 16), *ss.* 41, 42.

The special Act (11 & 12 Vict. c. cxlii.) incorporating a company for the purpose (*inter alia*) of draining and reclaiming land, empowered the "owner of a limited interest in land" to contract with the company for the execution of drainage and reclamation works, and for that purpose to charge on the land (in the manner provided by the Act), the cost of executing the works. The Act defined the term "owner of a limited interest in land," as including "any person entitled to any land subject to any mortgage or charge thereon, provided such person shall be in possession of the land mortgaged or charged":—

Held, that this definition included a purchaser in possession of land upon which the vendor had a lien for unpaid purchase-money.

The Act provided (by sect. 34) that, "from and after the due execution of the works mentioned in any contract" (between the company and an owner of land) "or of any part of any such works, such execution, together with the amount due in respect of the same, being duly certified by three directors of the company under the seal of the company, the company shall be entitled to, and shall have a lien and charge upon the lands so drained, &c., for the moneys or money mentioned in such certificate as aforesaid . . . and such lien or charge shall have priority over every other charge or incum-

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19 Ch D 484
24 Ch D 88

brance affecting the same land," except ground rents and tithe commutation rent-charge:

Held, that the certificate of the directors was not conclusive, but only *primâ facie* evidence of the due execution of the works mentioned in it, and that if, notwithstanding the certificate, it was shewn that the works had not been duly executed according to the contract, the company would not be entitled to the statutory charge on the land as against a prior incumbrancer, or even as against the equitable owner.

A second mortgagee who is in possession of the mortgaged property and expends money in permanently improving or preserving it, is not entitled as against the first mortgagee to any charge on the property for the money so expended.

The 41st and 42nd sections of the *Companies Clauses Act*, 1845, requiring mortgages to be duly stamped and the consideration to be duly stated, do not make void an instrument the consideration for which is apparent, though it is not in terms stated.

A provision in a company's special Act that moneys were to be borrowed by order of a general meeting:

Held, to be directory only, and not to postpone money borrowed without such order to other mortgages of the company, ranking in other respects *pari passu*.

The borrowing powers of companies and the priorities of mortgagees under the 42nd section of the *Companies Clauses Act* considered.

THIS action was brought to enforce by foreclosure or sale a charge which the Plaintiff company claimed upon certain lands in *Sussex*, by virtue of the statutory powers conferred by their Act of incorporation, or otherwise.

The defendants were *William Ashford* and some other persons who were the holders of mortgage debentures issued by the company; *Mary Charlotte Pocock*, the owner in fee of the land subject to the Plaintiffs' alleged charge and to other incumbrances; the persons entitled to or interested in those other charges or incumbrances; and the *West of England and South Wales District Bank*, who claimed to be entitled to a charge as derivative equitable mortgagees upon the Plaintiffs' mortgage debt.

Proceedings against some of the persons originally named as Defendants had been stayed.

The Plaintiffs were incorporated in the year 1848 by an Act 11 & 12 Vict. c. cxlii., "for the purpose of executing the necessary operations connected with draining, irrigating, warping, embanking, reclaiming, inclosing, and improving lands," and other purposes

incidental thereto, with perpetual succession, and power to purchase, hold and sell, lands for the purposes of the Act.

By sect. 3 of the Act it was provided that in the construction of the Act the words "owner of a limited interest in land," should mean and include (*inter alia*) "any person entitled to any lands subject to any mortgage or charge thereon, provided such person shall be in possession of the lands mortgaged or charged."

Sect. 4 provided that "if any owner of lands shall be desirous of exercising any of the powers given by this Act, he shall enter into and execute a contract with the said company, for the execution by them of the necessary works for the purposes of draining, irrigating, warping, embanking, reclaiming, inclosing, and improving such lands, or for any or either of the said purposes; and in such contract shall be stated and set forth his Christian name, surname, and place of abode, the nature of his estate and interest in the lands proposed to be drained, irrigated, warped, embanked, reclaimed, inclosed, or improved, the particulars of such lands, and of the lands (if any) of any person other than such owner of lands that will be required to be entered upon or cut through for the purpose of executing such works, or that will be prejudicially affected thereby; the particulars of the works intended to be executed, the then net estimated annual value of the lands proposed to be drained, irrigated, warped, embanked, reclaimed, inclosed, or improved, an estimate of the probable increased annual value of such lands when the intended works shall have been executed, the amount which under and by virtue of such contract as aforesaid is to be paid to the said company for the execution of the same, and the probable amount of purchase or compensation money (if any) required to be paid in respect of the lands (if any) required to be entered upon, cut through, interfered with, or affected."

Sect. 6 provided that when any such contract should have been entered into, the company should advertise a notice of it as therein mentioned, and should also serve a copy of the notice upon all occupiers, owners, and lessees of the lands affected by the contract.

Sect. 7 provided that in case the owner of lands who should have entered into any such contract with the company should be "an owner of a limited interest in land," who should be desirous

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of charging the inheritance of such land under the powers of the Act, he should make a statutory declaration who were the persons entitled to any estate in such land in remainder or in reversion, and of the persons (if any) entitled to any mortgage or charge on such land, and the nature and description of their estate and interest, and the company should serve a notice on such persons.

Sect. 8 provided that any person desirous of objecting to the exercise by the owner of such lands entering into such contract of the powers which he was desirous of exercising should within a limited time deliver to the Inclosure Commissioners for England and Wales, and also serve on the company, a statement in writing of the grounds of his objections.

Sect. 12 empowered the Inclosure Commissioners in all cases in which any such copies of contract and statement of objections (if any) were thereinbefore directed to be delivered and served as aforesaid, after they should have considered the contract and objections, by order under their seal, called the "original order," to direct that the works in the contract mentioned should be forthwith executed by the company, and in case the contracting owner should be an "owner of a limited interest" in the lands affected by the contract, by their order to declare that it was right and proper that the contract price for the execution of the works, and the costs, charges, and expenses properly incurred in relation thereto should be charged upon the inheritance of the lands.

Sect. 19 provided that, in case no person should within the time limited deliver to the Inclosure Commissioners, and also serve on the company a statement of objections, or if any person having delivered and served such statement, should fail to proceed upon his objections, the company should make proof before two justices of the due publishing and giving by the company of the requisite notices and advertisements, and of the fact that no statement of objections had been delivered and served, or that if delivered it had not been proceeded with within the time limited, and the justices were directed to give a certificate that the required advertisements and notices had been duly published and given respectively.

Sect. 25 empowered the company, in the execution of the works

mentioned in any such contract, to alter, vary, and deviate from the same.

Sect. 33 empowered the Inclosure Commissioners, in the case of a contract entered into by an "owner of a limited interest in land," to make an "absolute order," charging absolutely on the inheritance of the lands affected by the contract the sum mentioned in the "original order" as proper to be charged.

By sect. 34: "The said company shall, from and after the making of any such absolute order or orders as aforesaid, in case any such shall have been made, or in case no such shall have been made, and the said justices shall have certified in manner hereinbefore provided in that behalf, then, from and after the due execution of the works mentioned in any such contract as aforesaid, or of any part of such works (such execution, together with the amounts due in respect of the same, being duly certified by three directors of the said company under the seal of the said company) be entitled to and shall have a lien and charge upon the lands so drained, irrigated, warped, embanked, reclaimed, inclosed, or improved as aforesaid, for the moneys or money mentioned in such absolute order or orders, or in such certificate of such three directors as aforesaid, as the case may be, and the same lands shall thenceforth be and continue liable to the payment of the said several moneys respectively to the said company; and such lien and charge shall have priority over every other charge or incumbrance affecting the same lands, except ground rents and rentcharges created under a certain Act of Parliament made and passed in the seventh year of the reign of King *William* IV. for the commutation of tithes in *England* and *Wales;* and the said company shall and may at any time or times thereafter enter upon the lands last aforesaid, or any of them, and receive and take the rents and profits of the same, until the said company shall, by and out of such rents and profits, have received the said moneys respectively last aforesaid, together with lawful interest thereon from the date of such certificate."

By sect. 36: "If the person who shall have entered into any such contract as aforesaid shall be the 'owner of a limited interest in land' within the meaning of this Act who shall be desirous of charging the same or the inheritance thereof, it shall be lawful

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for such person, his heirs, executors, or administrators, after any such absolute order shall have been made by the said Inclosure Commissioners, if any such shall have been made as aforesaid, or if no such absolute order shall have been made, and if the said justices shall have certified as aforesaid, then, after the making of the certificates of the said justices and of the said directors as aforesaid, to charge the lands so drained, irrigated, warped, embanked, reclaimed, inclosed, or improved as aforesaid, or any part of them, with the moneys or money mentioned in such absolute order or orders, if any, or in such certificate of the said directors of the said company, or any part thereof, and with the amount of the costs of raising the said several moneys; and such person, his heirs, executors, or administrators, shall upon obtaining such absolute order or orders, if any, or such certificates of such justices and directors as aforesaid, have power to raise the moneys last aforesaid," under the provisions of certain Acts therein mentioned, "or by mortgage of such lands or any part thereof," and for that purpose to demise the lands by way of mortgage, "and all charges created upon the said lands under or by virtue of the said Acts of Parliament or of this Act, or any or either of them, or by such demise, shall have priority and be preferred to all other liens, charges, and incumbrances, except ground rents and rent-charges created under the Acts for the Commutation of Tithes in *England* and *Wales*; and the absolute order or orders of the said commissioners, if any, and the certificates of the said justices and directors respectively, shall be conclusive evidence to all intents and purposes of the right and title of the person who shall have entered into the contract to which such order or orders, if any, or such certificates, shall refer, to enter into such contract and to make such demise as aforesaid, and to charge the lands mentioned in such contract and plan, or either of them, or any part or parts thereof, with the moneys mentioned in such absolute order or orders, if any, or of the certificate of such three directors, together with the costs of raising the same, and shall also be conclusive evidence that the advertisements and notices hereinbefore directed to be published and given respectively have been duly published and given respectively, and that all other the provisions of this Act which require anything to be done and performed prior to

the making of such mortgage or demise have been duly complied with."

By an agreement dated the 3rd of June, 1859, and made between *Robert Hume* of the one part, and *Thomas Kingdon* and *Thomas Pocock* of the other part, after recitals that Admiral Sir *Maurice Berkeley* was, under and by virtue of certain grants from the Crown, lord of the hundred and manor of *Bosham* in *Sussex*, and that *Kingdon* and *Pocock* had applied in the then last session of Parliament for an Act to enable them to inclose and reclaim part of the lands situate in *Chichester Harbour*, parts of which lands were situate within the said hundred, and comprised the lands between high and low water-mark, and that the Lords of the Admiralty had caused a report to be made that the Act should not be granted, and that in consequence of the sudden termination of the then last session of Parliament the Act was stopped, and the right of the undertakers to proceed therewith in the then present session was reserved, and that *Hume* had agreed with Admiral *Berkeley* for the purchase of all his estate and interest in the waste lands, or lands within the said hundred, between high and low water-mark (except such part as lay in *Bosham Creek*), *Hume* agreed with *Kingdon* and *Pocock* that he would use his utmost endeavours to procure the said bill to pass into an Act, and that in the event of the Act being obtained, he would sell to *Kingdon* and *Pocock* all his estate and interest in all such parts of the said lands between high and low water-mark as were within the hundred of *Bosham*, and were in the lands proposed to be reclaimed and embanked under the provisions of the intended Act, for £3050, and *Kingdon* and *Pocock* agreed that in the same event they would purchase the same lands at that price. And it was agreed that the purchase should be completed within two years from the passing of the Act, and that the £3050, with interest, should be a charge upon the land to be inclosed.

On the same day another agreement was entered into between the same parties. This agreement contained recitals of the application to Parliament for the Act, and the reservation of the right to renew the application; that *Hume* was mortgagee in fee, with power of sale, of the manor of *Chidham* in *Sussex*, and of the Island of *Pilsea* in *Chichester Harbour*, and certain other heredita-

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ments; and that the Act comprised the mud lands in the harbour which were within the manor of *Chidham* and hundred of *Bosham*. And *Hume* agreed to sell to *Kingdon* and *Pocock*, and they agreed to purchase (in the event of the Act being obtained) the manor of *Chidham*, together with the island and other hereditaments, for £2400. The purchase was to be completed within two years after the passing of the Act, and it was agreed that the £2400, with interest, should be a charge upon the manor and island.

The proposed Act was passed in 1859, under the name of the "*Chichester Harbour Embankment Act*, 1859." This Act provided (*inter alia*) that as soon as the embankment and reclamation thereby authorized should have been completed, and the sea effectually excluded at high tide, to the satisfaction of two justices of the peace for the county of *Sussex*, and certified under their hands, and certain other conditions complied with, and subject to certain other provisions, the waste lands reclaimed (which were by the Act defined as meaning and including the "waste lands, sand banks, mud lands, mud banks, and slobs," in the estuary of *Chichester Harbour*, delineated in a certain plan) should thenceforth vest in and become the property of the undertakers, their heirs and assigns for ever, in such shares and proportions as might be agreed upon between themselves, and that thenceforth all and every the estate, right, title, and interest of her Majesty, and of all corporations and persons whatever in the said waste lands, should be barred and determined.

The powers of the undertakers were limited to a period of five years from the passing of the Act. *Kingdon* and *Pocock* were among the persons named in the Act as the undertakers. The waste lands referred to in the Act included the mud lands within the hundred of *Bosham*, comprised in the first agreement of the 3rd of June, 1859, above-mentioned, and also divers waste lands within the manor of *Chidham* which were comprised in the second agreement of the 3rd of June, 1859. The waste lands comprised in the Act were claimed by the Crown, and by Admiral *Berkeley* (afterwards Lord *Fitzhardinge*) as lord of the manor and hundred of *Bosham*, and a portion of them was claimed by the lord of the manor of *Chidham*. In consequence of these claims the promoters of the Act entered into the two agreements of the 3rd of June,

1859. The time for the completion of the works authorized by the Act was extended by the "*Chichester Harbour Embankment Act*, 1864," until the 13th of August, 1867, but no part of the lands were reclaimed by the undertakers before that date.

On the 14th of August, 1864, *Kingdon* released to *Pocock* all his interest under the Act of 1859, or in any other capacity, in the waste lands by the Act authorized to be reclaimed.

In October 1864, *Hume* commenced a suit in the Court of Chancery against *Pocock* for the specific performance of the first agreement of the 3rd of June, 1859. On the 16th of December, 1865, a decree was made in this suit for the specific performance of the agreement, if a good title could be made by the Plaintiff to the lands therein comprised: vide *Hume* v. *Pocock* (1). A good title was afterwards shewn to the property, and an order, based on an agreement between the parties, was made in the cause on the 9th of July, 1866, that a sum of £1699 13*s.* 8*d.* then in Court should be applied, first in payment of certain costs, and then in part payment of a sum of £4116 9*s.* 3*d.*, due from the Defendant to the Plaintiff on the 29th of June, 1866. And it was declared that the lands comprised in the first agreement of the 3rd of June, 1859, ought to stand charged with the payment of the balance of the £4116 9*s.* 3*d.* remaining due to *Hume* after the payment before directed, with interest on such balance up to the day of payment.

On the 16th of January, 1867, Lord *Fitzhardinge* granted and conveyed such parts of so much of the waste lands and mud banks in *Chichester Harbour* authorized to be reclaimed by the Act of 1859 as were situate within the hundred of *Bosham*, to *Hume* in fee.

In October, 1864, *Hume* commenced another suit in the Court of Chancery against *Pocock* for the specific performance of the second agreement of the 3rd of June, 1859, and on the 2nd of May, 1865, a decree was made for specific performance provided a good title could be made to the property: vide *Hume* v. *Pocock* (2). A good title was afterwards shewn, and on the 9th of July, 1866, an order, also based upon agreement, was made that a sum of £1337 9*s.* 2*d.*, then in Court, should be applied, first in payment of certain costs,

(1) Law Rep. 1 Eq. 423; Ibid. 1 Ch. 379. (2) Law Rep. 1 Eq. 662.

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and the residue thereof in part payment of a sum of £3209 3*s.* 9*d.*, due to *Hume*, on the 29th of June, 1866, from *Pocock* on account of the purchase-money of the property comprised in the second agreement of the 3rd of June, 1859, and interest thereon. And it was ordered that the balance remaining unpaid of the £3209 3*s.* 9*d.*, and interest thereon, from the 29th of June, 1866, should be a charge on the lands comprised in that agreement until payment of the balance by *Pocock*.

Thomas Pocock died on the 9th of February, 1869, having by his will given all his estate real and personal to his widow, the Defendant *M. C. Pocock*, and having appointed her his sole executrix. On the 20th of January, 1870, *Hume* died, having by his will devised and bequeathed all his real and personal estate to the Defendants *William Paxton* and *R. A. Gibbons*, upon trust for sale and conversion.

On the 26th of April, 1869, an agreement in writing (purporting to be made under the powers of the Plaintiff company's Acts) was entered into between the Plaintiff company and the Defendant *M. C. Pocock*. This agreement contained recitals that Mrs. *Pocock* was then entitled in possession, as an owner of a limited interest in lands within the meaning of the Act, to the lands mentioned in the agreement (and which included the lands comprised in the two agreements of the 3rd of June, 1859), which lands comprised in the whole 1857 acres or thereabouts; that Mrs. *Pocock*, being desirous of exercising the powers given to owners of a limited interest in lands by the Act, had proposed to the company to enter into the contract with them thereinafter contained for the execution by them of divers necessary works for the purpose of draining, embanking, and otherwise improving the said lands, and that the company had agreed to enter into the said contract with Mrs. *Pocock*, and that the particulars of the works intended to be executed were set forth in the schedule thereunder written, and that the amount which under and by virtue of the contract was to be paid to the company for the execution of the works was estimated at the sum of £39,430 13*s.* 6*d.* (subject to the provisions thereinafter contained); and that Mrs. *Pocock* was desirous that the inheritance of the said lands should be charged with the £39,430 13*s.* 6*d.*, or other the expenses of the

execution of the said works, and with the costs, charges, and expenses in the Act mentioned under the powers in the Act contained. And it was witnessed that, in consideration of the covenants on the part of Mrs. *Pocock* thereinafter contained, the company thereby contracted with her, her heirs, executors, administrators, and assigns, that the company would, within such time as should be reasonable, in a scientific and skilful manner, execute in and upon the said lands the several works the particulars whereof were mentioned in a schedule, or instead thereof, or in addition thereto (as the case might be), would make and perform such other works (if any) as should during the progress of the aforesaid several works be found necessary for the due and proper draining, embanking, levelling, fencing, making roads upon, and otherwise improving the said lands as nearly in accordance with the works set forth as aforesaid as reasonably might be, and should be approved by Mrs. *Pocock*, her heirs, executors, administrators, or assigns, or as the Inclosure Commissioners should, if referred to them under the provisions of the company's Act, direct in that behalf. And Mrs. *Pocock*, in consideration of the company's covenants thereinbefore contained, after agreeing to pay moneys expended, commission and interest as therein appearing, agreed that she, her heirs, executors, administrators, or assigns, would, after any absolute order should have been made by the Commissioners by virtue of the company's Act (if any such order should be made), or after the making of the certificates of the justices and directors for the time being of the company in the Act mentioned (if any such should be made), and if in either case the said sum of £39,430 13*s.* 6*d.*, or any part thereof, or of such part of the said sum as should become payable under or by virtue of the provisions of the contract, or any of the costs, charges, and expenses of raising the said sum, or any part thereof, should be unpaid to the company, make and execute, on the request of the company, to such person or persons as the company should nominate, a valid demise, mortgage, or charge for the purpose of raising and securing the said moneys, costs, charges, and expenses, or such part thereof respectively as should then remain unpaid. The agreement also contained some special provisions (which it is not necessary to state at length) making the certificate or certificates

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of the company's secretary conclusive evidence as against Mrs. *Pocock* of the due execution of the works by the company in accordance with the agreement, unless Mrs. *Pocock* should give a notice of objection within one year from the time of delivery of any such certificate.

The schedule to this contract required that a particular bank mentioned in it should be constructed of soil, gravel, and chalk.

After the execution of this contract, Mrs. *Pocock* made the declaration required by the Act as to her interest in the lands included in the contract, and the incumbrances to which it was subject, and the names of the persons entitled to those charges; and the company gave the notices and advertisements required by the Act. Two persons gave notices of objection to the contract, but they afterwards withdrew or failed to proceed with their objections, and the company and their secretary having afterwards given and made the proofs and declaration required by the Act, two justices of the peace for *Sussex*, on the 21st of August, 1869, certified the due publishing and giving of the advertisements and notices required by the Act to be published and given.

On the 12th of January, 1869, the Commissioners of Woods and Forests had executed a conveyance to Mrs. *Pocock* of the rights of the Crown in and to the waste lands in *Chichester Harbour* mentioned in the Act of 1859, to hold the same subject as in the conveyance was mentioned.

On the 20th of September, 1869, before any part of the works mentioned in the agreement of the 26th of April, 1869, had been commenced, an agreement by letter was come to between Mrs. *Pocock* and the company for a considerable deviation from the plan of reclamation as specified in the original agreement.

On the 10th of December, 1869, Mrs. *Pocock* executed a mortgage to the company of the lands comprised in the agreement of the 26th of April, 1869, and some other lands, as an additional security for the moneys which should become due to the company on that agreement. This mortgage contained a proviso that nothing therein contained should in anywise defeat, suspend, delay, or otherwise prejudicially affect all or any of the rights powers and remedies of the company under or by virtue of the agreement of the 26th of April, 1869, or their Act. And it was

agreed that the company should be deemed by the operation of the mortgage to have become and to be mortgagees (but not mortgagees in possession) of the mortgaged premises, so as to have and be capable of exercising in relation thereto the same or the like powers and discretions, both legal and equitable, as were incidental by statute or otherwise to an ordinary mortgage security, over and above the company's powers and discretions under their Act. After the date of this mortgage, the company proceeded to execute the works mentioned in the agreement of the 26th of April, and the mortgage of the 10th of December, 1869, and on the 6th of February, 1872, a certificate was signed by three of the directors of the company, and sealed with the company's seal, by which it was certified that the works of embanking, fencing, and making roads, specified in a schedule thereto, had been duly executed by the company in and upon the lands mentioned in the schedule, under and in pursuance of the company's Act, and the agreement of the 26th of April, 1869, which said works constituted a part of the works in that agreement mentioned and thereby agreed to be executed. And it was further certified that the sum of £20,000 had been expended and was due and payable to the company in respect of the execution of the said works so specified in the schedule, and expenses attending thereon. This certificate related to 519 acres comprised in the agreement of the 26th of April, 1869.

Shortly after this certificate was given, the secretary of the company gave a certificate signed by himself, in accordance with the provisions contained in the agreement of the 26th of April, 1869, that the sum of £21,000 had been expended by the company on the works specified in that contract. Mrs. *Pocock* never gave any notice of objection to this certificate.

On the 8th of October, 1872, another agreement in writing was entered into between the Plaintiff company and Mrs. *Pocock* (expressed to be made under the powers of the company's Act). This agreement contained provisions similar to those of the agreement of the 26th of April, 1869, and provided for the execution by the company of the works mentioned in that contract, together with additional works, and for an addition of £12,000 to the original contract price. It was not shewn that any cer-

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tificate was ever given by the company's secretary under this agreement.

By their statement of claim the Plaintiffs alleged that upon the execution of the directors' certificate the £20,000 became by virtue of the company's Act a lien and charge on the lands comprised in and referred to in the agreement of the 26th of April, and the mortgage of the 10th of December, 1869, in priority to all other charges or incumbrances, except tithe rent-charge.

The Plaintiffs also alleged that, in addition to the £20,000, Mrs. *Pocock* was indebted to them to the amount of £23,276 5*s.* 5*d.*, for moneys duly and properly expended in works of embankment upon the mortgaged property, being further part of the works mentioned in the agreement of the 26th of April, 1869, which, as the Plaintiffs alleged, had been duly certified in the manner required by the Act, and had become a further charge on the mortgaged property, having priority as in the case of the £20,000.

On the 30th of January, 1874, the Plaintiff company was ordered to be wound up. After the winding-up order was made, a certificate was signed by three persons, who were directors of the company at the date of the order, of the due execution of the works comprised in the second agreement with Mrs. *Pocock*, and the expenditure of the sum of £23,276 5*s.* 5*d.* upon them.

The Plaintiffs alleged that since the commencement of the liquidation, considerable sums of money had been expended under the direction of the Court out of the assets of the company, in necessary works for preventing an irruption of the sea upon the mortgaged property, and they claimed that these sums were in the nature of salvage, and ought to be recouped as such to the assets of the company. And, if the Court should be of opinion that the Defendant *Ashford* and the other debenture holders were entitled to a specific charge in the nature of a derivative charge or lien on the interest of the company in the mortgaged property, the Plaintiffs submitted to redeem the debentures.

The Plaintiffs claimed a declaration that they were entitled to a charge on the mortgaged property for the £20,000, the other moneys expended by them, and the salvage moneys, with interest,

in priority to the respective charges, estates, and interests of all the Defendants, or at any rate in priority to all the Defendants except the debenture holders, and in priority to the debenture holders, so far as regarded the salvage moneys and interest thereon; an account of what was due to the Plaintiffs; and to have their mortgage, charge, or incumbrance enforced by foreclosure or sale.

The debenture holders claimed a first charge on the interest of the company in the property the subject of the action.

Hume's representatives claimed a lien on the lands comprised in the two agreements of the 3rd of June, 1859, in respect of the balance of the purchase-money due to them under their agreements, in priority to the Plaintiff company and all the other Defendants.

Hume's representatives and two of the debenture holders delivered counterclaims, by which they sought to have their charges enforced by the Court by sale of the property or otherwise.

It appeared by the evidence that part of the works included in the first contract with Mrs. *Pocock* had not been in fact constructed in accordance with the provisions of the contract, and that after the certificate of the directors was given in 1872, an important part of one of the banks had given way, and the bank had required a considerable amount of repair; also that the works constructed under the second contract had given way very shortly after their construction, and that some of the lands comprised in that contract had become submerged again and had so remained ever since.

It appeared also that *Hume* had, by an arrangement with *Pocock*, obtained a security for the unpaid purchase-money in respect of the *Chidham* lands, and this arrangement, in the opinion of the Court, displaced the original lien on those lands. Consequently, in the course of the argument, the claim of *Hume's* representatives was limited to a lien on the *Bosham* lands.

North, Q.C., *Lumley Smith*, Q.C., and *Dauney*, for the Plaintiffs:—

We are entitled under our Act to a charge on the reclaimed lands for the £20,000 and the other moneys expended, in priority to the lien of *Hume's* executors, as well as against Mrs. *Pocock*.

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And, as to the moneys which we have expended in the nature of salvage, they were expended for the benefit of all the persons interested in the property, and we are entitled to a prior charge in respect of them. The property has been preserved by means of them: *Fisher* on Mortgages (1); *Millard* v. *Harvey* (2). But, even if we are postponed to *Hume's* executors, we were mortgagees in possession, and are entitled to these moneys as against the mortgagor: *Godfrey* v. *Watson* (3).

Though the second certificate of the directors was given after the commencement of the winding-up, the directors who signed it were in office at the date of the winding-up order, and that is sufficient: *Madrid Bank* v. *Bayley* (4).

Davey, Q.C., and *Northmore Lawrence*, for *Hume's* representatives:—

Under the circumstances Mrs. *Pocock* was not an "owner of a limited interest in land" within the meaning of the Act. *Hume* had obtained in the suit for specific performance an order creating a charge on the land for a definite sum. The Plaintiffs are therefore not entitled to a statutory charge in priority to us, whatever may be their rights as against Mrs. *Pocock* herself. The definition was not intended to include as an owner a purchaser who had not completed his purchase, but had been let into possession.

[FRY, J.:—Is there any substantial difference between that case and the case of a conveyance to a purchaser, and a mortgage of the land by him to the vendor to secure the unpaid purchase-money? In the latter case the Act would clearly apply.]

Again, the second certificate is worthless, as the persons who signed it were then no longer directors of the company, by reason of the winding-up order. The signing was not a mere ministerial act; the object was to create in favour of their own company a charge binding third persons.

This is comparatively unimportant, because it is clear from the evidence that the works mentioned in the second certificate were not duly executed. They were constructed so that the sea soon

(1) 3rd Ed. pp. 149, 150, 620.
(2) 10 Jur. (N.S.) 1167.
(3) 3 Atk. 517.
(4) Law Rep. 2 Q. B. 37, 40.

broke in again, and the land referred to in that certificate is now entirely under water again. The certificate of the directors is not made by sect. 34 conclusive evidence of the due execution of the works; it is only *primâ facie* evidence.

The agreement for a deviation is not authorized by sect. 25 of the Act; it really provides, not for a deviation or variation in the original works, but for the execution of additional works and an increase in the price to be paid.

Millar, Q.C., and *W. Phipson Beale*, for Mrs. *Pocock*:—

We adopt the argument of the counsel for *Hume's* representatives as regards the Plaintiffs' statutory rights. Moreover, we say that the agreements between Mrs. *Pocock* and the Plaintiffs give them no greater rights against her. She entered into the agreements with the Plaintiffs expressly as "an owner of a limited interest in land." Though an additional security is given for the money expended, it is given only subject to the fulfilment of the statutory conditions, and there is a further condition imposed for Mrs. *Pocock's* benefit, viz., the certificate of the company's secretary.

As to the "salvage" claim, the express contract excludes the implication of any other contract.

The Defendant, *Thomas Pocock*, in person.

Fischer, Q.C., and *Cozens-Hardy*; *Kekewich*, Q.C., and *Hornell*; *W. D. Rawlins*; *G. Daw*; and *Davenport*, for the debenture-holders.

Cookson, Q.C., and *Romer*, for the *West of England Bank*.

North, in reply:—

The certificate of the directors is conclusive except in the case of fraud or gross mistake. The object of it is to prevent the raising of the questions which are now raised.

The works were duly executed in the first instance; they stood for a long time, and were broken down by an extraordinary tide.

As regards Mrs. *Pocock*, the certificate of the company's secretary is by the agreement made conclusive.

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FRY, J.:—

I am now about to deal only with the questions which have arisen between the Plaintiffs on the one hand, and Mr. *Hume's* representatives and Mrs. *Pocock* on the other.

The first question is, whether the representatives of Mr. *Hume* are entitled to any charge upon the entirety of the lands reclaimed. It has been contended that under the terms of the two agreements of the 3rd of June, 1859, Mr. *Hume* had a lien on all the lands to be inclosed. In my judgment it is not necessary to determine that question of construction, because it appears that with regard to each of those contracts a subsequent arrangement was come to pending the suits for specific performance, the effect of which was, according to my construction of it, to confine the lien to the lands comprised in each agreement respectively, and the orders which were afterwards made also confined it, according to my interpretation of them, to the lands comprised in each agreement. It is apparent that the lands comprised in the *Bosham* agreement are part of the 519 acres which have been successfully reclaimed. They are, in fact, so much of those lands as lies to the south of the boundary of the parish of *Thorney*. On that Mr. *Hume's* representatives are entitled to a lien, as declared by the order of the 9th of July, 1866, subject to the question whether that lien, which is of course *primâ facie* the first charge, has been displaced by the terms of the Act of Parliament which constituted the Plaintiff company? [His Lordship stated the general effect of the Act and the provisions of sect. 34, and the nature of the contract of the 26th of April. 1869.] Now, three of the directors of the company did, on the 6th of February, 1872, certify that £20,000 had been expended on 519 acres, which was a portion of the land intended to be dealt with by the agreement of April, 1869, and a portion only. That certificate, if it be good, will bind Mr. *Hume's* representatives, as having a prior lien or charge which would be displaced by the effect of the certificate. The question is, whether that certificate is or is not good?

In the first place, it is objected that Mrs. *Pocock* was not a "limited owner" within the meaning of the Act. In my judgment that objection cannot be maintained. According to the definition the "owner of a limited interest in land" includes "any person entitled

to any lands subject to any mortgage or charge thereon, provided such person shall be in possession of the land mortgaged or charged." At the time when Mrs. *Pocock* entered into this contract she was the owner in equity of the lands, subject to the prior lien of the vendor. She was in possession, and therefore it is quite plain she was a limited owner within the meaning of the Act.

The next question arises upon the 34th section, and it is this. Is the certificate given by the directors conclusive evidence of the two things stated in it, viz., the due execution of the works and the amount expended in the due execution of the works? The Act is silent as to the certificate being evidence in the particular state of circumstances which arises here, that is, as against persons having prior liens or charges on the property. It does contain a provision in sect. 36 making it conclusive evidence in the event of the limited owner raising money on the estate for the purpose of paying off the charge, and that fact opens an argument both ways. It has been contended on the one hand, that if it is conclusive evidence in the one case it must *à fortiori* be conclusive evidence in the other. On the other hand, it has been said that the expression in the one case coupled with the silence in the other imports a difference between the two cases. I think that sect. 36 does not throw much light on the question whether the certificate is or is not conclusive evidence in the present case. But it is important to observe that the persons who are to make the certificate are persons who are themselves interested in the matter. They fill no judicial or *quasi*-judicial position between the parties. They are themselves the directors or agents of the company which is to obtain the charge. I am bound to say I can see no reason why as against third persons who may be affected by the certificate it should be of itself conclusive evidence of the things which are stated in it, the Act being silent on the subject. According to my view, the words of sect. 34, taken by themselves, import two things before the lien arises, viz., first, the due execution of the works, and, secondly, the certificate stating the due execution of the works. I consider that the true view is that the certificate is *primâ facie* but not conclusive evidence of the due execution of the works and of the amount which has been laid out upon them.

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I ought perhaps to observe in addition that the directors were under no obligation to make any statutory declaration or any solemn affirmation of the truth of the certificate. They merely prepared the certificate, and filed copies of it in the manner indicated in the Act.

Then there arises this further question: Has it been shewn that the terms of the certificate were untrue? The certificate does not represent the real state of the facts of the case. In my judgment there are two questions, or rather the question subdivides itself into two. In the first place, Was the certificate made after the due execution of the works mentioned in such contract?" I have come to the conclusion that it was not. The contract required that a particular bank should be constructed of soil, gravel, and chalk, with sluices, and instead of its being so constructed the greater portion of it was really made of mud and gravel only, and there was no chalk put into it according to the terms of the agreement. The result was this. The bank appears to have required, from time to time after the date of the certificate, various works to be done upon it in order to maintain it in due condition. Notwithstanding the amount which was so expended upon the execution of the works, the particulars of which are not before me, the whole of the top of that bank between the two deeps, as they are called, *i.e.*, the two flows of water through the bank, which portion was by far the greater part of the largest bank in the embankment that was ever executed, gave way, the whole top of it came down, and the work had to be done over again at an expense of very nearly £1000. The contractors chose not to make the bank in the manner indicated by the contract, and the result was, as probably might have been expected, that the bank would not stand. Can I say that the works were duly executed? They were not done precisely in the terms indicated by the contract, and they were done in such a manner that they would not stand for five or six years. I think that was not a due execution.

Another very material question is this: Was the amount mentioned in the certificate as due in respect of the works mentioned in the contract a sum really due in respect of works mentioned in the contract? It was not. What happened was this—the con-

tract having been made in April, 1869, on the 20th of September, and before possession had been given to the company, and therefore before a single spade had been put into the soil, the parties determined to enter into a new contract, the object of which was that they were so completely to vary the works, that I find from subsequent transactions, they increased the contract price by £12,000. That was in substance a new contract entirely. It was one which departed, perhaps wisely, from the original contract, and for reasons which occurred to the persons subsequently and before they had begun any operations on the soil. It is apparent from the certificate of the company's secretary, which certified for a sum of £21,000 just about the date of the directors' certificate, and which, as is admitted, represents the same expenditure as the directors' certificate for £20,000, that a large part of that £20,000 was spent on an embankment which is not mentioned in the contract of April, 1869; at least one half the money had nothing whatever to do with the contract of 1869.

Then it is said that the whole of those works are within the contract of 1869, having regard to its operative words. It is said that the new works are works "instead of or in addition to the original works." In terms they clearly are not, because, to bring such works within the terms of that clause, they must be such works as are found necessary during the progress of the specified works. The object of that clause is very apparent. All works of this nature are liable to surprises by reason of something discovered during their execution, and if there be no power contained in the contract to modify them in the least degree, difficulties arise that may result in putting an end to the progress of all the works under the contract, whereas, if a clause of this sort be inserted, the necessary variations may be made. But that clause is not intended to justify, and does not justify, an entirely new contract made before a single operation is entered upon, and, if it did justify it, it would be *ultrà vires*, because there is no reason whatever why the particulars of the scheme arranged in September, 1869, should not be embodied in a contract giving all the particulars which the statute required, and which would then have been open to the inspection of the persons interested, in the same manner as the contract of April, on which they should be enabled

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to form their own opinion, and act as they might think right. Therefore the effect of what was done by the company was to defeat the provisions of the Act of Parliament as to giving particulars of the contemplated contract. In my judgment, therefore, the certificate of the directors is not binding, for the two reasons which I have mentioned, and fails in its effect as against Mr. *Hume's* representatives. The result will be, that I shall declare them entitled to a lien in priority to the Plaintiffs for the balance of the £4116 9*s.* 3*d.*, according to the terms of the order of the 9th of July, 1866, with interest at 5 per cent., upon so much of the 519 acres as lies to the south of the parish boundary.

I ought to add that with regard to the second contract entered into in October, 1872, the same reasons apply against its binding the representatives of Mr. *Hume*, together with this further objection, that the land comprised in it was only inclosed from the sea between September and November, 1873, and that the certificate of the directors was not made till the 30th of May, 1878, when the land had been for five years under water. It appears to me impossible to say that that was land reclaimed within the meaning of the Act.

A question then arises between the Plaintiffs and Mrs. *Pocock*. With regard to her, the Plaintiffs seek relief on three grounds; they rely first on the contracts of April, 1869, and October, 1872, alone; secondly, on those contracts together with the statute; and thirdly, on the mortgage of the 10th of December, 1869. With regard to the contracts and the statute, the observations which I have already made in considering the questions between the Plaintiffs and Mr. *Hume's* representatives apply, and in my judgment the Plaintiffs have not obtained under the statute a valid charge as against Mrs. *Pocock*. But when I come to consider the contract of 1869 alone, a different state of circumstances arises.

[His Lordship referred to the provisions of that contract with reference to the certificate of the company's secretary, and to the fact that she did not object to the certificate as to the £21,000 within the time limited by the contract, and continued:—] The result is that, in my opinion, Mrs. *Pocock* is concluded to hold that the works mentioned in the secretary's certificate have

been actually perfected by the company, and that they have been perfected in accordance with the terms of the agreement, and consequently I think she is bound by the certificate to the extent of the £21,000 certified in it, and cannot take the objections to the certificate of the directors which I have allowed in favour of Mr. *Hume's* representatives, because they are the very objections which she is precluded from taking, except within the limited time given to her to object to the certificate of the secretary. [His Lordship then referred to the mortgage of the 10th of December, 1869, which he held did not affect the operation of the contract of April, 1869.] I hold, therefore, that Mrs. *Pocock* is liable to make a valid mortgage to secure to the company the £21,000, and the commissions.

With regard to the second contract, things stand in a totally different position. It does not appear that any such certificate has been given, and the consequence is, as it appears to me, that the whole thing is open as between Mrs. *Pocock* and the company, and I am unable to declare any charge in favour of the company.

There remains only one other question for my present decision. It appears that after the company went into liquidation, they, under the direction of the Judge in Chambers in the liquidation, expended certain moneys in maintaining the sea walls of the reclaimed land. It is said that the moneys so expended constitute a charge by way of salvage valid against prior mortgagees. In my judgment, that is not so. A second mortgagee who enters into possession and does work by way of improvement on the mortgaged land, which may result in its protection and the improvement of its value, is not entitled as against the first mortgagee to any charge in respect of the money so expended by him. If that were so, we should have in almost every case of a second mortgagee in possession, an inquiry whether any sum of money laid out in permanent improvements by the second mortgagee was not to be deemed to be salvage. It is admitted that no such case can be produced, and I am not going to make a precedent which I think would be highly inconvenient. I cannot, therefore, give effect in any way to this claim as against Mr. *Hume's* representatives. As against Mrs. *Pocock*, there will be

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the usual allowances to a mortgagee in possession for permanent improvements.

Millar:—The account will be as for wilful default in the usual way.

FRY, J.:—Yes.

A second question arose as to the rights of the debenture holders upon the money recovered by the company against Mrs. *Pocock*, and as to the right of the *West of England and South Wales District Bank* to rank *pari passu* with the debenture holders.

The Plaintiff company's Act incorporated the *Companies Clauses Consolidation Act*, 1845, so far as the same was not varied or altered by the special Act, or was not inconsistent with the purposes and provisions thereof, and the 46th section provided "that it shall be lawful for the company to borrow on mortgage or bonds such sums of money as shall from time to time be authorized to be borrowed by an order of a general meeting of the company, not exceeding in the whole the amount of one third of the subscribed capital of the company then paid up, and for securing the repayment of the money so borrowed with interest, to mortgage the profits of the company and any lands of the company, and, if they think fit, the future calls upon the shareholders of the company, or to give bonds in manner mentioned in the *Companies Clauses Consolidation Act*, 1875."

The Plaintiff company issued debentures to the extent of £8870. They had on the 3rd of August, 1842, a capital subscribed and paid up to the extent of between £34,000 and £35,000, and they had, therefore, then a borrowing power of over £11,000, and there was a margin in their borrowing powers which was not exhausted.

On the 3rd of August, 1872, the Plaintiffs were indebted to their bankers the *West of England and South Wales District Bank* in the sum of about £23,350. and on that day they executed a deed the terms of which were as follows:—

"The *West of England Land Drainage and Inclosure Company* hereby deposit in your hands deeds of property as specified below, as security for money now due, or which may hereafter become

due from the said company to the said bank, and doth hereby undertake to execute, whenever called upon to do so, at its own expense any further security or mortgage which may be required, the principal money to be ultimately recoverable not to exceed £30,000, and the said company doth hereby charge the property specified in the said deed with payment of the said sum. Given under the seal of the said company."

The bank claimed to the extent of their advances to be first equitable mortgagees of the company's interest in the lands in question, and alleged that the greater part of the moneys advanced by them to the company was advanced for the specific purpose of carrying out the company's reclamation works on the mortgaged property, and was applied in direct payment of the company's cheques to contractors and others for work done and materials supplied towards the reclamation of the mortgaged property.

The bank delivered a counter-claim to enforce their charge by sale or otherwise.

Cookson, Q.C., and *Romer*, for the *West of England Bank*:—

The claim of the bank is good within the provisions of the general Act: *In re Hamilton's Windsor Ironworks* (1); *In re Patent File Company* (2); *Ex parte Moor* (3); *Campbell's Case* (4). If not, we say the company were authorized to raise this money outside their Act: *Waterlow* v. *Sharp* (5).

Fischer, Q.C., and *Cozens-Hardy*, for debenture holders:—

No general meeting has sanctioned this borrowing, and the mortgage is not by deed under seal disclosing the consideration: *Gardner* v. *London, Chatham, and Dover Railway Company* (6). The mortgage of the bank is not good under the 42nd section of the *Companies Clauses Act*, 8 & 9 Vict. c. 16.

Kekewich, Q.C., and *Hornell*, for other debenture holders, mentioned *Fountaine* v. *Carmarthen Railway Company* (7); *White* v. *Carmarthen Railway Company* (8).

(1) 12 Ch. D. 707.
(2) Law Rep. 6 Ch. 83.
(3) 10 Ch. D. 530.
(4) Law Rep. 9 Ch. 1.
(5) Law Rep. 8 Eq. 501.
(6) Ibid. 2 Ch. 201.
(7) Ibid. 5 Eq. 316.
(8) 1 H. & M. 786.

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W. D. Rawlins, G. Daw, and *Davenport,* for the other debenture holders.

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I read the 46th section of the special Act as being a variation of, and substitution for, the 38th section of the *Companies Clauses Consolidation Act;* and with that variation it appears to me the subsequent clauses of the general Act may be read into, and read with the special Act.

The first question now before me is with regard to the rights of the other debenture holders. The Plaintiff company concede that the debenture holders were entitled to a charge upon the particular asset in question. The *West of England Bank* pleaded, and I think rightly pleaded, that the debenture holders were entitled to a charge on the whole property of the company. It appears to me that any detailed inquiry into the operation of the charge given in favour of the debenture holders is not necessary. I will only say this: It appears to me that the charge is on all the lands of the company; and I think that according to the true construction of those words, as against the grantors of the security, it must be held to cover the charges on the land the subject of this litigation. I hold, therefore, upon the admissions and the reason of the case, that the debenture holders have a charge upon the asset in question.

The second question that arises is with regard to the priority of the *West of England Bank* over these debenture holders. It has been said that, notwithstanding the provisions I have referred to, the Plaintiff company retained an inherent power to borrow money in a manner other than that pointed out by the *Companies Clauses Act* and their own special Act, and to an extent other than that pointed out by those Acts, and upon a security other than that indicated in those Acts. Having that inherent power, it is said they validly exercised it by creating a special charge upon a special asset by the deed of December, 1879. In my judgment, the Plaintiff company had no such power.

The question has arisen for decision more than once. A very large number of indicia of indebtedness were, we know, issued for money borrowed, under the name of *Lloyd's* bonds; and in the

case which determined the rights of their holders, that of *Chambers* v. *Manchester and Milford Railway Company* (1), Mr. Justice *Crompton*, in his judgment having referred to the 8th section of the special Act, said this: "It is said that this leaves untouched the power of borrowing money on bond or by simple contract, so that though the company can only borrow that sum on mortgage the Legislature have left to the company a larger power of borrowing money on other security. But it is a strange construction that, by an enactment giving them a limited express power of borrowing they are to have a general implied power of borrowing. I agree with Mr. *Lush* that the more natural construction is, that this is an enabling section, giving power to the company which it would not otherwise have possessed, and that the directors cannot borrow money in any other way, so as to bind the company." That exposition of the law, so far as I know, has always been followed ever since.

Then the question did arise, whether the overdrawing by the company of the account at their bankers to a small extent for the immediate necessities of the company, was or was not prohibited by the effect of that section. Mr. Justice *Crompton* expressed his opinion that it was, saying: "I think Mr. *Lush* gave the right answer, that if a company were permitted to overdraw a small amount, there is no reason why they should not do so to any extent to which their credit could reach." I would only make this further observation, that inasmuch as it is impossible for a company to borrow upon security other than that provided by the section of the Act, so also it is impossible for them to create a security for money already borrowed which would only be another way of getting round the prohibition of the Act. The cases that have arisen on *Lloyd's* bonds, as they were called, have illustrated that, because they were acknowledgments of what was represented as an antecedent debt. I hold therefore there is no such inherent power in the company, and that the only claim the bank can assert is under the Act of Parliament.

Then arises the question whether they have any such claim. Now, in the first place, it appears to me that I must take the deed which was executed in favour of the bank, as charging some

(1) 5 B. & S. 588, 607.

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of the lands of the company, because it creates a charge upon a deed which conveyed an interest in the lands of the company. Then the debenture holders raise several objections to the bank's claim. They say, in the first place, that the 46th section requires that the amount to be borrowed shall be specified in an order of the general meeting of the company and that no such order was given. I think the cases which have been referred to shew that that is a directory portion of the statute, and not one which it is obligatory on the lender to shew has been performed as against the company, but that the company borrowing money must be taken to have done all that was necessary to give themselves that power. Then is it a provision which the creditors of the company —I mean the debenture holders of the company—can insist upon? The case I was referred to, before Lord *Hatherley*, of *Fountaine* v. *Carmarthen Railway Company* (1), does shew that the provision with regard to the general meeting is inserted in the Act of Parliament for the benefit of the shareholders, and not of the creditors. They could not stop the company exercising that power, and therefore it does not interest them.

The next objection is that the 41st section of the *Companies Clauses Act* provides that every mortgage for securing money shall be by deed under the common seal duly stamped, and wherein the consideration shall be truly stated. Now, is the consideration truly stated in this instrument. It is not in express terms stated, but I think that the recital of the deposit as a security for moneys now due, or which might thereafter become due from the company to the bank, does disclose to me the true consideration, namely, forbearance in respect of an existing debt. Again, I ask myself, is this direction with regard to consideration one which is absolutely obligatory, and which, if it does not appear, avoids the instrument? I think it is not. I think that the consideration is required to be truly stated for the purpose of the stamp, and that the real object of the 41st section is to see that the revenue gets its fair share of money out of this transaction; and here the amount upon which the stamp is to be calculated is disclosed by the deed, because £30,000 is the extent to which the deed is to go, and the amount which would be ulti-

(1) Law Rep. 5 Eq. 316.

mately recoverable upon it, and upon that amount the stamp, of course, will require to be paid. Therefore that difficulty seems to me not to avail the debenture holders.

Then, in the next place, it is said that the 42nd section requires the distribution of the moneys realized for distribution among the debenture holders, in proportion or according to the respective sums in the mortgages mentioned, to be advanced by such mortgagees respectively. That again, it appears to me, is a directory clause, and it would not avoid a mortgage because it did not shew in terms the amount advanced for such mortgage. If it is ascertainable, it is enough, and here the main object of giving notice of the extent of it to everybody who takes after this mortgage is satisfied by the declaration that it covers the amount mentioned. Lastly, the mortgage is open to this observation, that it does not include the whole lands of the company, for it includes one property only. But, according to my view of the 42nd section, every mortgagee who comes in under the Act, whatever the property charged in the mortgage may be, has to bring that property into hotchpot with all the other mortgagees, and all the claims, therefore, are consolidated, and all the subject-matters of the mortgages are consolidated; and upon the whole subject-matter the whole charge is made, and the whole proceeds of the subject-matter are distributed *pari passu*. I hold, therefore, that to the extent of the difference between £8870 and one-third of the capital subscribed for and paid-up on the 3rd of August, 1872, and no further, the bank have a mortgage debt *pari passu* with the other debenture holders.

Solicitor for Plaintiffs: *J. C. Stogdon.*

Solicitors for Defendants: *G. J. Browlow & Howe*, agents for *John Toby, Exeter; Ovans, Bayley, & Adams; Coode, Kingdon, & Cotton*, agents for *J. Daw & Son, Exeter; Clarke, Woodcock, & Ryland*, agents for *Fussell, Prichard, & Co., Bristol; J. B. Batten; J. W. Hortin.*

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LAIRD *v.* BRIGGS.

[1879 L. 148.]

Easement—Prescription Act (2 & 3 *Will.* 4, *c.* 71), *s.* 8—*Computation of Period of Forty Years—Exclusion of Life Estate—"Person entitled to any Reversion"—Practice—Amendment of Pleadings—Alteration of Case—Rules of Court*, 1875, *Order* XXVII., *r.* 1.

The words in sect. 8 of the *Prescription Act*, "any person entitled to any reversion expectant on the determination" of a life estate, are not limited to an owner of the whole reversion, but include a tenant at will to such an owner.

Therefore, if, within three years after the determination of a life estate in land, an action is brought by a tenant at will to the reversioner against the claimant of an easement by prescription over the land, the term of the tenancy for life is to be excluded in the computation of the period of forty years mentioned in the Act.

The Plaintiff claimed to be tenant in possession of a part of the foreshore of the sea at *Margate*, and he sought to restrain the Defendant from removing shingle from the foreshore, and from placing bathing machines upon it. The Defendant claimed by forty years' enjoyment an easement entitling him to do the acts complained of, and by his statement of defence he denied that the Plaintiff was or ever had been in possession of the foreshore in question, "save subject to the rights of the Defendant." At the trial the Defendant asked for leave to amend his statement of defence by striking out the qualifying words, making the denial of the Plaintiff's possession an absolute one, and claiming the ownership of the foreshore:—

Held, that the Defendant could not be allowed thus completely to change his case.

Rule as applied to that time for amendment should have been given 19 Ch D 12 CA

BY virtue of an agreement dated the 1st of May, 1876, and made between *Francis Nathaniel* Marquis *Conyngham* of the one part, and *Mark Sanderson* of the other part, and of an assignment dated the 13th of March, 1877, and made between *Sanderson* and the Plaintiff, the Plaintiff entered into possession as tenant of so much of the foreshore of the manor of *Minster* in *Kent* as extended from the eastern end of the *Margate Aquarium* to the northern side of *Broadstairs Pier*, and of all the rights of the Marquis (except wreckage and groundage) in and over such foreshore. At the date of the agreement the whole of the foreshore above mentioned formed part of the manor of *Minster*, and the Marquis

See as to appeal from refusal of leave to amend 20 Ch D 662 CA

was seised of the manor, including all the foreshore, for an estate for life in possession. The Marquis died on the 17th of July, 1876, and on his decease his eldest son, the present Marquis, became seised of the manor for an estate for life. The Plaintiff alleged that he was in possession of the foreshore in question as tenant of the present Marquis upon the terms of the agreement, and that the Defendant and his servants and workmen had wrongfully entered upon the foreshore, and had carried away therefrom large quantities of sand, shingle, and chalk, and had also placed and continued on such foreshore bathing machines, to the damage and without the leave of the Plaintiff. The Plaintiff claimed damages for the wrongs complained of, and an injunction to restrain the Defendant from any repetition of the acts complained of, and from causing or allowing bathing machines to remain on the foreshore.

The statement of claim was delivered on the 11th of July, 1879.

The Defendant, by his statement of defence, said that in 1824 *John Boys*, since deceased, was entitled to an estate in fee simple in possession in certain lands at *Margate*, a portion of such lands being immediately adjacent to and bounded solely on the north side thereof by a part of the foreshore with regard to which the Plaintiff claimed relief. The Defendant said that he had never, nor had any one through whom he claimed, so far as he was aware, done any of the acts complained of by the Plaintiff, except upon such part of the foreshore as lay immediately adjacent to the said property. The Defendant said that in 1824 and the five following years, *John Boys* constructed at a large outlay on the above-mentioned property certain buildings and works which were known as the *Clifton Baths*, and (among other things) levelled the shore between low-water mark and the cliffs, so as to make it available for the purpose of bathing, made a roadway along the shore, by which bathing machines could be drawn backwards and forwards, and executed a great number of improvements upon the *Clifton Baths* property and the foreshore fronting the same. These works were completed in the year 1829. The Defendant said that "Ever since the last-mentioned year the foreshore opposite to the *Clifton Baths* property has been uninterruptedly

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used by the owners and tenants thereof for the time being for the purpose of a sea-bathing establishment, and additional works have been from time to time constructed upon it. Ever since the year 1829 bathing machines have been placed upon it, and drawn backwards and forwards as required for the purposes of the business, and large quantities of sand, shingle, and chalk have been constantly removed for the purpose of keeping the said foreshore in order for such purpose. No interruption has ever been made, nor any remonstrance offered by any one in respect of any such things done upon the said foreshore until the Plaintiff commenced the present action."

The Defendant further said that in the year 1869 the *Clifton Baths* property was vested for an estate in fee simple in possession in one *J. H. Boys;* that on the 6th of February, 1869, he conveyed the property in fee simple to *T. D. Reeve,* who died on the 26th of April, 1875; and that the Defendant was the tenant of the trustees of the will of *Reeve,* and as such, entitled to exercise all the rights belonging to the trustees in respect of the *Clifton Baths* property and the foreshore fronting the same. The Defendant (by paragraph 9) denied "that the Plaintiff is now or ever has been in possession of so much of the foreshore of the manor of *Minster* as lies opposite the *Clifton Baths* property, save subject to the rights of the owners of the *Clifton Baths* property and their tenants over and upon such foreshore," and he made a similar denial with respect to the title of the Marquis *Conyngham* to the foreshore opposite the *Clifton Baths* property at the date of the agreement of the 1st of May, 1876.

The Defendant denied that he, or any one so far as he was aware, had wrongfully (though he admitted that he had without the leave of the Plaintiff) entered upon the said foreshore, or done any of the other acts complained of by the Plaintiff. And the Defendant claimed (by paragraph 11) the right, on behalf of himself and the trustees of *Reeve's* will, who were entitled to an estate in fee simple in possession of the *Clifton Baths* property, to enter upon the foreshore fronting that property, and to place and keep bathing machines thereon, and to carry away therefrom such quantities of sand, shingle, and chalk as might be necessary for the purpose of keeping such foreshore in order for the purpose

of sea-bathing, and for the beneficial enjoyment of the *Clifton Baths* property.

By his reply the Plaintiff joined issue on the Defendant's denial of his possession and of the title of the Marquis, and denied the rights claimed by the Defendant. And the Plaintiff submitted that, if the Defendant or his trustees had acquired any right by user or otherwise over the foreshore (which the Plaintiff denied), the same was acquired during the period in which *Henry* Marquis *Conyngham*, deceased, and *Francis Nathaniel* Marquis *Conyngham*, deceased, were respectively tenants for life of the manor of *Minster*, of which the foreshore formed part, and that no right had been acquired as against the present Marquis, or the Plaintiff as his tenant. And the Plaintiff pleaded, if necessary, the *Prescription Act*, 2 & 3 Will. 4, c. 71.

The present Marquis was tenant for life of the manor.

Cookson, Q.C., and *W. W. S. Follett*, for the Plaintiff :—

The foreshore in question is parcel of the manor.

[*North*, Q.C., for the Defendant :—We admit that.]

Under sect. 8 of the *Prescription Act* (1) the life estates are to be excluded in the computation of the term of forty years. The bringing of this action is a resistance of the Defendant's claim, and it was brought within the three years. A reversionary life estate is as good as any other reversion.

[FRY, J. :—Strictly speaking, your interest was a remainder, not a reversion.

(1) Sect. 8: "Provided always, and be it further enacted, that when any land or water upon, over, or from which any such way or other *convenient* watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof."

It has been suggested that the word "convenient" above placed in italics is a misprint for "easement."

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North, Q.C.:—There is no suggestion of title except under the agreement of 1876.]

The word "reversion" must be construed in its popular, not in its technical, sense.

The Defendant must shew that he has had an exclusive possession; any one can walk over the sea-shore. Placing bathing machines on it is not an act of ownership. The *onus* is on the Defendant to prove his title: *Hall* on the Sea-shore (1); *Coke* upon *Littleton* (2).

North, Q.C., and *T. Brett*, for the Defendant:—

Sect. 8 does not apply to a person making such a claim as the Plaintiff does. Indeed it is doubtful whether it can apply at all to the present case. The Plaintiff derived his title under the late Marquis; he obtained no new title from the present Marquis; he was in possession before the life estate of the present Marquis began. Neither the present Marquis nor any of his predecessors has objected to what we have done.

[FRY, J.:—If the Defendant is tenant at will to the present Marquis, does he not derive title under the reversioner? Is it not enough if the resistance be made by any one who has an estate carved out of the reversion? If the tenant for life made a demise for a year and the tenant for a year resisted the claim to an easement within the three years, would not that be a resistance by a person entitled to a reversion?]

Perhaps it might be.

[FRY, J.:—Why should not resistance by a tenant at will be as effectual?]

If there is no power of leasing in the settlement of the estates of the Marquis, the agreement of 1876 was *ultrà vires*.

[FRY, J.:—The Plaintiff is in possession either under that agreement or under some other; *quâcunque viâ* he is at least tenant at will to the reversioner.]

(1) 2nd Ed. pp. 29, 32.

(2) 261 a, Butler's note.

It was never intended that he should be tenant at will except for the purposes of the agreement.

We ask leave to amend our statement of defence so as to claim an ownership of the foreshore. We wish to amend paragraph 9 by striking out the words "save subject to the rights of the owners of the *Clifton Baths* property and their tenants," and to amend paragraph 11 by making the claim of the Defendant and his trustees a claim "to be owners of and to enter upon the foreshore."

[FRY, J.:—This is a very serious change in your case, and I am not aware that the Court has ever gone so far. Between the decisions of the Court of Appeal in *Tildesley* v. *Harper* (1) and *Newby* v. *Sharpe* (2), I feel somewhat embarrassed.]

The granting leave to amend is always in the entire discretion of the Court. It can impose such terms as to costs or otherwise as it thinks fit. Of course the Plaintiff should have every opportunity of adducing further evidence.

[FRY, J.:—The object of allowing an amendment is to raise the real question between the parties. There is nothing to shew that this question of the right to the ownership of the foreshore was ever raised or thought of before.]

The real question is whether the Defendant is bound to pay the Plaintiff a toll for the use of the foreshore in the way in which he has used it for fifty years. For that purpose it is immaterial whether he can prove that he is owner of the foreshore, or that he is entitled only to an easement upon it.

Cookson, Q.C., and *W. W. S. Follett*, for the Plaintiff, were not heard on the question of amendment.

FRY, J.:—

I will decide now upon the question of amendment. The application made is to allow an amendment of the statement of defence. In that statement it is in effect admitted that the Plaintiff is in possession of the foreshore, subject to the rights of the

(1) 10 Ch. D. 393. (2) 8 Ch. D. 39.

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Defendant. There is only a qualified denial of possession, that is to say, the possession is denied save subject to the rights of the Defendant, which is equivalent to admitting possession subject to those rights. I am now asked to allow the Defendant to insert in his statement of defence an unqualified denial of the Plaintiff's possession. The effect of that would be very serious in the conduct of the case. The Plaintiff is now entitled to rely upon his possession as giving him a *primâ facie* title; if I allow the amendment to be made, he will not be able to rely upon it in any way. Now it appears to me that no broader distinction exists between different classes of actions than between an action brought to recover the possession of land, and an action brought by a person in possession of land, and if I were to allow this amendment to be made, I should turn this action from the one into the other.

Ought I to allow such a complete change of front in the defence? Having regard to the case of *Newby* v. *Sharpe* (1), where Lord Justice *James* expressed his disapproval of the amendment which I had then allowed, upon the ground that it entirely altered the nature of the case made, I think I ought not to allow the proposed amendment to be made.

I will make this further observation. I am bound, under rule 1 of Order XXVII., to allow such amendments to be made "as may be necessary for the purpose of determining the real question or questions in controversy between the parties," and it appears to me that, down to the time of this amendment being suggested or shortly before, nobody ever thought of denying the title of the Marquis *Conyngham*, under whom the Plaintiff claims, to this foreshore. I do not think there ever was any real question as to the title of the Marquis to the foreshore, although undoubtedly the Defendant has now set up a claim against him.

On these grounds I feel myself constrained to decline to allow the amendment.

North then admitted that he was not prepared to prove a forty years' enjoyment on the part of the Defendant, independently of the life estates.

(1) 8 Ch. D. 39.

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FRY, J.:—

The Plaintiff appears to me to have proved his right. According to the admission of the Defendant he is in possession of the foreshore in question, and, as it appears to me, he is in possession in some way or other under the present Marquis *Conyngham*, and derives from him at any rate an estate at will, if nothing more. The Defendant has from the year 1829, according to the statement of his counsel, exercised certain rights which may amount to evidence of an easement over the foreshore in question. But it appears that the estates of the Marquis have been settled, and that there has been from the year 1829 downwards a period occupied by tenancies for life, which, when deducted from the actual period of enjoyment, will bring that period to less than forty years. That being so, a question arises upon the 8th section of the *Prescription Act*. [His Lordship read the section.]

The present action was brought within three years from the death of the last tenant for life.

Now it is admitted (and the contrary could not well be contended) that the action is a resistance to the Defendant's claim, and therefore the only question which remains is whether the resistance is by a person "entitled to any reversion expectant on the determination" of the late Marquis's life estate. What is the meaning of the expression "any person entitled to any reversion"? Does it mean only a person who takes the entirety of the reversion in the first instance, whatever that reversion may be, or does it include any person who takes any estate part of the reversion? For instance, suppose the reversion were in fee, and the resistance were by a tenant from year to year or for a term of years under the reversioner in fee, would that be a resistance by a "person entitled to any reversion"? In my judgment it would, because the tenant in that case would derive his estate out of the reversion, and would therefore have a title, though not to the whole reversion, yet to a part of the reversion, and his resistance would, in my opinion, be within the terms of the section. Is he any the less a person "entitled to any reversion" because his estate is an estate at will? In my judgment he is not. The estate at will is derived out of the reversion, and he is therefore a person entitled, not to the entirety of the reversion, but to a part of the

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reversion. That being my view, and it being admitted that the Defendant cannot prove a forty years' enjoyment exclusive of the period of the tenancies for life, it appears to me that the Plaintiff has made out his case, and I must give judgment for him accordingly.

Solicitors for Plaintiff: *Harrisons.*
Solicitors for Defendant: *Remnant, Penley, & Grubbe.*

VERNON *v.* VESTRY OF ST. JAMES, WESTMINSTER.

C. A. 1879 V. C. M. *Dec.* 1, 2, 3, 6, 8, 11, 12. 1880 *Jan.* 14. C. A. *Nov.* 16, 27, 29, 30.

[1878 V. 4.]

Dedication to Public—Highway—Thoroughfare—Urinal—Nuisance—Vestry—Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 88.

A court which was not a thoroughfare had for seventy or eighty years been at all hours open to the public, and had been paved, lighted, and cleansed by the parish vestry, and the owners of the soil were not shewn to have during that time exercised any rights of ownership over the soil of the court:—

Held, by *Malins*, V.C., that the court had been dedicated to the public so as to bring it under the vestry according to the *Metropolis Local Management Act*.

Under the *Metropolis Local Management Act* (18 & 19 Vict. c. 120), s. 88, the vestry has power to provide and maintain urinals in situations where they deem such accommodation to be required:—

Held, by *Malins*, V.C., that any question whether one place or another was more fit for the erection of an urinal must be left to the decision of the vestry; but that the vestry would be controlled by the Court if they acted in an unreasonable manner and occasioned a nuisance to the owners of adjoining property.

Held, by the Court of Appeal, that as the erection of an urinal was not necessarily a nuisance, the provision of the Act authorizing the vestry to erect urinals did not empower them to erect one where it would be a nuisance to the owners of adjoining property, there being no words in the Act which expressly or by necessary implication authorized them to create a nuisance.

THIS was an action by the trustees under the will of the Rev. *G. Pollen* and the other owners of property in *Old Burlington Mews, Regent Street*, to restrain the vestry of the parish of *St. James, Westminster*, from erecting a public urinal in the mews.

The Rev. *G. Pollen*, who was seised in fee of the mews and of some of the houses round it, died in 1812, having by his will devised the mews and his adjoining property to trustees, whose successors were some of the Plaintiffs in this action. The other Plaintiffs were Messrs. *Lewis & Allenby*, owners in fee of land abutting on the mews, and holding, under Mr. *Pollen's* trustees, a lease of other land. They had built on this land a large building for their business as silk mercers, in which they employed about 120 young women, who constantly used an entrance to

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Messrs. *Lewis & Allenby's*, which was in the mews. Another Plaintiff was a Mr. *Bingley*, who held under Mr. *Pollen's* trustees, and the back of whose buildings abutted on the mews. Another Plaintiff was a Mr. *A. W. Bingley*, who had a wine cellar in the mews; and another was a tailor named *Thorne*, the back door of whose shop was in the mews. The mews was not a thoroughfare, and the only entrance to it was by a narrow gateway or passage from *Regent Street*, which had no gates and was never closed. People frequently came and made water in the passage. The vestry of the parish in which the mews was situated proposed to erect a public urinal in the mews near the entrance. It would be close to Mr. *Bingley's* cellar door, and not above four feet from the back door of Mr. *Thorne's* shop, and the Plaintiffs brought this action to restrain the erection of the urinal, alleging, first, that the soil of the mews was the property of Mr. *Pollen's* trustees, and that the construction of the urinal there would be a trespass; and, secondly, that it would be a cause of serious annoyance and a nuisance to Messrs. *Lewis & Allenby*, Mr. *Bingley*, and Mr. *Thorne*.

The action came on for hearing before Vice-Chancellor *Malins* on the 1st of December, 1879, and many witnesses on each side were examined. As to the right to the soil of the mews, it was proved to have belonged to Mr. *Pollen* and his predecessors; but for seventy or eighty years at least the mews had been paved, cleansed, and lighted by the vestry, and the public had had free access to it. The only acts of ownership exercised by the adjoining householders seemed to have been the putting up of a shutter box and the placing or moving of a dung pit, as to which, however, the facts were disputed. Under these circumstances the vestry claimed that the mews had been dedicated to the public, and had thus been placed under their control by sect. 96 of the *Metropolis Local Management Act*.

On the point of nuisance, much contradictory evidence was produced, the effect of which is stated in the judgment of the Vice-Chancellor.

Glasse, Q.C., and *S. Dickinson*, for the Plaintiffs:—

There has been no dedication of this mews to the public. It is not a thoroughfare, and the only persons who have gone into it

are those who were going to the houses in it, and some trespassers for the purpose of committing a nuisance, but no right to commit a nuisance can be set up in that way. A dedication to the public cannot be shewn from such facts: *Vestry of Bermondsey* v. *Brown* (1); *Poole* v. *Huskinson* (2). The vestry may have a right to erect public urinals, but not on our land.

The witnesses for the Plaintiffs were then examined and cross-examined as to the property and as to the nuisance.

S. Dickinson, for the Plaintiffs, summed up:—

If this mews is private property there is an end of the case. It has been proved that the soil belonged to Mr. *Pollen*, and that there has been no dedication to the public. The only thing alleged by the vestry is that they have paved, lighted, and cleansed the mews; but by sects. 98 and 130 of the *Metropolis Local Management Act* (18 & 19 Vict. c. 120), they are compelled to pave and light all such places, whether public or private; and the owner of the soil could not have prevented them, as by sect. 96 all highways are under their control, whether the soil belongs to them or not. But independently of this, the proposed exercise of their powers is oppressive and unjust, and will be restrained by the Court. According to *Biddulph* v. *St. George's Vestry* (3), an injunction would have been granted under such circumstances: *Stainton* v. *Woolrych* (4); *Attorney-General* v. *Metropolitan Board of Works* (5). The power to put up an urinal does not involve a power to create a nuisance.

[MALINS, V.C., referred to *Tinkler* v. *Wandsworth District Board of Works* (6) and *Cook* v. *Corporation of Bath* (7).]

Bristowe, Q.C., and *G. Walker*, for the vestry:—

The vestry have this disagreeable duty imposed upon them by Act of Parliament (8), and have come to the conclusion that this

(1) Law Rep. 1 Eq. 204.
(2) 11 M. & W. 827.
(3) 3 D. J. & S. 493.
(4) 23 Beav. 225.
(5) 1 H. & M. 298.
(6) 2 De G. & J. 261.
(7) Law Rep. 6 Eq. 177.
(8) 18 & 19 Vict. c. 120, s. 88: "It shall be lawful for every vestry and district board to provide and maintain urinals, water-closets, privies, and like conveniences in situations where they

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is a proper place in which to erect an urinal. They are bound to erect urinals, and wherever one is erected it must be more or less an annoyance to somebody, though it may not amount to a nuisance. Would the Plaintiffs prefer to have one in the middle of *Regent Street* opposite their shops? There is no suggestion of bad faith or of an intention to annoy, and if this objection is to prevail, the 88th section of the Act will in fact be repealed. *Robins* v. *Vestry of St. Marylebone*, an unreported case, before *Hall*, V.C., and *Mason* v. *Wallasey Local Board*, before the Master of the Rolls on the 6th of December, 1876 were precisely similar cases, and in each the Court refused to interfere. The vestry has been made the supreme judge of the place, and cannot be controlled unless they are acting in manifestly bad faith: *Coats* v. *Clarence Railway Company* (1); *Tinkler* v. *Wandsworth District Board of Works* (2); *Galloway* v. *Corporation of London* (3); *Attorney-General* v. *Conservators of the Thames* (4). No great damage has been shewn, and none which is pecuniary, and if there is it can be assessed under sects. 88 and 151. As to sentimental injury, the Court will not interfere. In *Biddulph* v. *St. George's Vestry* (5), the urinal would have been in front of a large house.

MALINS, V.C.:—I see no difference in between the front door and the back door.

The witnesses for the vestry were then examined as to the necessity for an urinal in that neighbourhood, and to shew how little annoyance it would occasion, and as to the property in the soil of the mews.

G. Walker, for the vestry, summed up; and as to the dedication to the public, cited *Rex* v. *Barr* (6); *Winterbottom* v. *Lord Derby* (7). This is a highway within sect. 96 of the Act, and

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deem such accommodation to be required, and to supply the same with water, and to defray the expense thereof, and any damage occasioned to any person by the erection thereof and the expense of keeping the same in good order as expenses of sewerage are to be defrayed under this Act."

(1) 1 Russ. & My. 181.
(2) 2 De G. & J. 261.
(3) Law Rep. 1 H. L. 34.
(4) 1 H. & M. 1.
(5) 3 D. J. & S. 493.
(6) 4 Camp. 16.
(7) Law Rep. 2 Ex. 316.

is dedicated to the public whether the soil belongs to the adjoining landowner or not. The place has always been open, and the vestry have paved, lighted, and cleansed it without any interference on the part of the landowner, and this constitutes a dedication to the public: *Rex* v. *Lloyd* (1); *Barraclough* v. *Johnson* (2); *Grand Surrey Canal Company* v. *Hall* (3). *Poole* v. *Huskinson* (4) only shews that there cannot be a dedication to a limited part of the public. *Reg.* v. *East Mark* (5), *Bateman* v. *Bluck* (6), and *Reg.* v. *Petrie* (7) shew in how short a time dedication will be presumed. An urinal is not necessarily a nuisance, and its construction will in fact put an end to a nuisance.

Glasse, in reply:—

This place has only been used by the public for the purpose of committing a nuisance, and still remains the property of Mr. *Pollen's* trustees. The urinal may be wanted, but there has not been shewn any necessity for placing it where it will be an intolerable nuisance to the Plaintiffs, and to do so is beyond the power of the vestry.

1880. Jan. 14. MALINS, V.C., after stating who were the parties and what was the object of the action, and that it was proved that there was a great want of a public urinal in *Regent Street*, and stating what were the powers of the vestry under the Act, continued:—

The Defendants, the vestry, contend that so long as they exercise these powers in a fair and impartial manner they are the sole judges as to the proper situation for such accommodation. I am satisfied that they are in this case actuated only by a desire fairly and honestly to do their duty, and that, consequently, the burden of shewing that they are improperly exercising their powers lies on the Plaintiffs. I am also satisfied that the opposition of the Plaintiffs is not vexatious, but is founded solely on the honest belief that the proposed urinal, if erected, will be a

(1) 1 Camp. 260.
(2) 8 Ad. & E. 99.
(3) 1 Man. & G. 392.
(4) 11 M. & W. 827.
(5) 11 Q. B. 877.
(6) 18 Q. B. 870.
(7) 4 E. & B. 737.

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most serious nuisance and injurious to them. The contest, therefore, in my opinion, is perfectly *bonâ fide* on both sides.

Of course, when the Act authorizes the Defendants to provide urinals in situations where they deem such accommodation to be required, it means in places which are the property of the vestry or under their control, and not on private property. The opposition to its being placed in this particular situation is grounded, first, on the objection that the mews is private property, and not in any way subject to the control of the vestry; and if that is so, then of course they have no right to place the urinal there without the consent of the owners of the soil, and the Plaintiffs are consequently entitled to the injunction they ask. Secondly, that the urinal would be so close to the back door of the Plaintiff *Thorne* and the cellar doors of Mr. *Bingley*, and also to the rooms occupied by Messrs. *Lewis & Allenby* as to be an intolerable nuisance.

With regard to the first objection raised by the Plaintiffs, it appears that for some years before the death of the late Mr. *Pollen* in 1812, *Old Burlington Mews* had been, and has ever since been, used by the public as a public place, just as freely and constantly as any other public place or street in the parish. It is a *cul-de-sac* entered by a gateway from the west side of *Regent Street*, which is always open, there being no gate or other impediment to the public entering it at all times by day and by night. It has certainly been lighted, cleansed, and paved by the parish for the last seventy or eighty years, if not more, and latterly has been in every respect treated by the parish authorities as one of the public places under their control. And during the whole of this long period there has not been a single instance of Mr. *Pollen* himself, or the trustees under his will, who have always been seised in fee, raising an objection to or putting the slightest obstruction in the way of the free use of the mews by the public as foot passengers, or on horseback or in carriages, nor have the trustees ever paid anything for lighting, paving, or cleansing it. These are strong, and, as it appears to me, overwhelming, reasons for considering that there has been a complete dedication of the site of the mews to the public.

The question of dedication is a question of fact, and it is the duty of the Court to draw a just conclusion from the acts or

omissions of the parties. I think the principles upon which the Court should act are well laid down by Lord *Ellenborough* in *Rex* v. *Lloyd* (1). That was a very similar case, and Lord *Ellenborough* said—and what he said has been confirmed by every case that has taken place since—"I think that if places are lighted by public bodies, this is strong evidence of the public having a right of way over them; and to say that this right cannot exist because a particular place does not lead conveniently from one street to another, would go to extinguish all highways where (as in *Queen's Square*) there is no thoroughfare. If the owner of the soil throws open a passage, and neither marks by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public. Although the passage in question was originally intended only for private convenience, the public are not now to be excluded from it after being allowed to use it so long without any interruption." Then *Rex* v. *Barr* (2) is to the same effect. That was an indictment for stopping up a public footway leading from *Stoke Newington* to *Islington*. The land belonged to the Marquis of *Northampton*, and it was proved to have been used by the public for upwards of fifty years. The land had been occupied by a succession of tenants, and one of these frequently complained to Lord *Northampton's* steward that the public used the footway, whereby the land was injured, but no action was brought either by landlord or tenant against any one who used it. It was contended that these facts did not establish a public right of way over the *locus in quo*, as the user proved had been exclusively during the occupation of successive tenants whose acquiescence could not bind the reversioner. But Lord *Ellenborough* says, "After a long lapse of time and a frequent change of tenants, from the notorious and uninterrupted use of a way by the public, I should presume that the landlord had notice of the way being used, and that it was so used with his concurrence. In this case, however, we have express evidence of notice; for notice to the steward was notice to the landlord," and he held that it had been completely dedicated to the public by the long user. The case of *Poole* v. *Huskinson* (3)

(1) 1 Camp. 260. (2) 4 Camp. 16. (3) 11 M. & W. 827, 830.

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lays down the rules which I think are applicable to the present case. Lord *Abinger* says: "The direction may have had a great influence on the minds of the jury, and there must be a new trial. The user by the public with carriages since the award is no doubt evidence of a dedication by the owner to the public; and the notices which were fixed on posts, and which may be presumed to have been done with the consent of the owner of the soil, are strong evidence to the contrary. The interruptions also by the overseers who had the herbage are very material in the case." Mr. Baron *Parke* says: "There may be a dedication to the public for a limited purpose, as for a footway, horseway, or driftway, but there cannot be a dedication to a limited part of the public. In that respect the direction of the learned Judge was quite correct; not so the alternative that as such a partial dedication was invalid in law, it would nevertheless operate against the intention of the owner of the soil in favour of the whole public. I think it would be merely void. In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate, there must be an *animus dedicandi*, of which the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment. As to the ownership of the soil, I do not apprehend that there is any difficulty. It remains in the lord of the manor; for that portion of the soil only is taken from him for which he receives compensation and which is allotted to others." The same doctrine is expressed by Lord *Romilly* in *Vestry of Bermondsey* v. *Brown* (1). In the case of *Reg.* v. *East Mark* (2) it was uncertain to whom the soil belonged; it did not belong to the lord, and therefore it was presumed to belong to the Crown; and then it was argued that there was no person in a situation to dedicate it to the use of the public. Lord *Denman* says: "The law as lately laid down has led the Courts into very inconvenient inquiries. If a road has been used by the public between forty and fifty years without objection, am I not to use it, unless I know who has been the owner of it? The Crown certainly may dedicate a road to the

(1) Law Rep. 1 Eq. 204. (2) 11 Q. B. 877.

public, and be bound by long acquiescence in public user. I think the public are not bound to inquire whether this or that owner would be more likely to know his rights and to assert them; and that we have gone quite wrong in entering upon such inquiries. Enjoyment for a great length of time ought to be sufficient evidence of dedication, unless the state of the property has been such as to make dedication impossible." Mr. Justice *Patteson* expresses himself to the same effect; and Mr. Justice *Erle* says: "In this case there was uninterrupted user of the road by the public for about fifty years. I think the learned Judge would have been quite justified in telling the jury that although there must be an intention on the part of the owner to dedicate, such user was so strong an evidence of his intention, that the jury ought to find in favour of the dedication, unless there was some evidence that he did not consent." *Reg.* v. *Petrie* (1) is precisely to the same effect, and I need not, therefore, more particularly refer to it. *Bateman* v. *Bluck* (2) is also a very important case on this subject. Lord *Campbell* there says: "The jury found that there was such public highway; and we are bound to assume that finding to be good unless, as is contended, there cannot in law be a highway through a place which is no thoroughfare. It seems to me that such a doctrine is incorrect. There may or may not be a highway under these circumstances. Take the case of a large square with only one entrance, the owner of which has for many years permitted all persons to go into and round it; it would be strange if he could afterwards treat all persons entering it, except the inhabitants, as trespassers. In *Trustees of the Rugby Charity* v. *Merryweather* (3), Lord *Kenyon* laid down that there might be a highway through a place which was not a thoroughfare, and seems to have left it to the jury whether there was such highway or not. In *Woodyer* v. *Hadden* (4) the Court did not decide that there could not be a highway under such circumstances, but only that in that particular case there was none, and I do not find anything decided there which is necessarily inconsistent with what was laid down by Lord *Kenyon*." And the other Judges express themselves to the same effect. That a *cul-de-sac* is a highway or a public street just

(1) 4 E. & B. 737.
(2) 18 Q. B. 870.
(3) 11 East, 375, n.
(4) 5 Taunt. 125.

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as much as one where there is a thoroughfare, was decided by myself in *Souch* v. *East London Railway Company* (1), and my decision in that case agrees with that in *Trustees of the Rugby Charity* v. *Merryweather* (2), which must be considered as good law after the decision in *Bateman* v. *Bluck* (3), notwithstanding the observations of the Judges in *Woodyer* v. *Hadden* (4). To my mind the decision of Lord *Kenyon* appears as sound as anything possibly could be. The decision in the *Grand Surrey Canal Company* v. *Hall* (5) is to the same effect. There the dedication was by a public body, and they having built a swivel bridge over the canal, and allowed the public to use it for ten years, and then built a fixed bridge and allowed the public to use it, it was held that this amounted to a dedication, and it was established as being a public road. There is much in that case which is very pertinent to the present case.

[His Lordship then commented on certain acts of the adjoining leaseholders in applying to the vestry, and on the other hand to certain acts as to a dung pit. He also referred to the fact that the vestry had made a claim to the soil of another mews called *New Burlington Mews* under similar circumstances, and that certain letters written by the vestry clerk seemed to amount to an abandonment of the claim. The circumstances might, however, have been very different, and that case did not affect the present case. His Lordship therefore came to the conclusion that the first claim made by the Plaintiffs could not be sustained. The second claim was, however, in the opinion of his Lordship, far more important. Much evidence had been given on both sides. On the side of the Plaintiffs there was evidence that, independently of the particular nuisance to them, the situation was most unfit and improper; and on the other side that it was the best and most suitable which could be found in that neighbourhood, and that the nuisance would not be appreciable. His Lordship then stated and commented on the evidence.]

Now if the question between the parties was merely whether one situation or another was the more fit, I should be clearly of

(1) Law Rep. 16 Eq. 108.
(2) 11 East, 375, n.
(3) 18 Q. B. 870.
(4) 5 Taunt. 126, 138.
(5) 1 Man. & G. 392.

opinion that it was a question to be decided by the vestry, they being authorized by the Act to place urinals in situations where they deemed them necessary. On that part of the case I refer to *Austin* v. *St. Mary Lambeth Vestry* (1), where the question was whether certain pipes called *Aylesford* pipes, or others called *Lambeth* pipes should be used, and the Court held that as the evidence of the scientific witnesses on the merits of the respective pipes was conflicting, the Act gave the vestry power to determine which should be used. Against that decision there was an appeal, but as it turned out that the plaintiff was indemnified by the maker of the *Aylesford* pipes the Court of Appeal refused to enter into the question, and the decision therefore stands, and is a perfectly good decision. The same principle is to be collected from the case of *Biddulph* v. *St. George's Vestry* (2), and there it was decided that the discretion was in the vestry, and they having decided as to the place, it was not for the Court to interfere unless a strong reason was shewn. The same principle was acted on in *Attorney-General* v. *Great Eastern Railway Company* (3), where it was held that the discretion of the conservators of the river must prevail.

Therefore, I repeat, if the question before me were simply whether they were right in selecting the place, and whether one place or another was better, I should be bound to decide that the vestry are the sole judges as to what the situation should be. But great as the powers of vestries under the Act are, they are not absolute, and vestries are, like all other public bodies, liable to be controlled by this Court if they proceed to exercise their powers in an unreasonable manner, whether they are induced to do so by improper motives or from error of judgment. This is clear also from the case already cited of *Biddulph* v. *St. George's Vestry* (4), where the Court of Appeal held it to depend upon the question whether the vestry were exercising their powers in a reasonable manner. Vice-Chancellor *Stuart* had granted the injunction. The vestry appealed. It was argued for two days, and many cases were cited. Lord Justice *Knight Bruce* said: "The evidence as it stands does not appear to me to shew it to be certain or

(1) 27 L. J. (Ch.) 388.
(2) 3 D. J. & S. 493. 9 Jur. N.S. 953.
(3) Law Rep. 6 Ch. 572.
(4) 3 D. J. & S. 493, 500. 9 Jur. N.S. 953.

10 S.C. 4 Jur. N.S. 274, 1032

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probable that the works intended by the defendants will be or will create in point of law a nuisance, or to shew it to be certain or probable that the defendants are exceeding, or intending to exceed, the powers conferred on them by Act of Parliament, or to be or to have been actuated by any improper motive. So viewing the evidence, whatever it may be fit to do at the hearing of the cause in consequence of legal proceedings, whether merely civil or otherwise, if any shall be instituted, I think that the order before us, and the injunction, if any, issued under it, should be discharged." Now from that judgment it is plain that if he thought it certain or probable that a nuisance would be created he would have stopped it. Lord Justice *Turner* goes rather more fully into the matter; he says: "On the first point it is not contended on the part of the vestry that this Act of Parliament does confer upon them the right to create either a private or a public nuisance, and it is impossible to assume that the mere fact of an urinal being erected will of itself be a nuisance when we find power given by Parliament to erect such accommodations. Certainly it is not proved that the erection must be such as will constitute a nuisance either public or private. The first part of the argument therefore drops to the ground. But then it is said that the powers of this Act of Parliament are being exercised injuriously to private property, and that the exercise of them is not necessary. As to this I am far from thinking that this Court has not power to interfere with public bodies in the exercise of powers which are conferred upon them by Act of Parliament. I take it that it would be within the power and the duty of this Court so to interfere in cases where there is not a *bonâ fide* exercise of the powers given by Parliament; and I should be sorry to be supposed to entertain the notion that public bodies, under the general powers given them by Act of Parliament, can do what they think right. But when this Court is called on to interfere I take it to be its duty to consider the question whether there is or is not a *bonâ fide* exercise of the power; and on the evidence I can see nothing to warrant the Court in imputing to the defendants an exercise of their powers otherwise than *bonâ fide*. . . . . It is said that if the powers be as extensive as contended for on the part of the defendants they

might erect an urinal in front of any gentleman's house. The answer to that is, that such a proceeding could not possibly be held a *bonâ fide* exercise of the powers given by statute." There are also two cases, *Robins* v. *Vestry of Marylebone*, before Vice-Chancellor *Hall*, and *Mason* v. *Wallasey Local Board*, before the Master of the Rolls, the particulars of neither of which have I been able to obtain; but it was stated that in *Mason* v. *Wallasey Local Board* the objection was that they were about to erect an urinal in front of an hotel at *New Brighton*, and, as I understand, in those cases it was not because there was any want of jurisdiction that the Plaintiffs failed, but upon the merits.

It is clear that the Court has power to entertain such suits, and that these vestries must not execute these powers in such a manner as to create a nuisance when the object of the Act is to remove nuisances. In the present case, the plan is to place the urinal within a few feet of the back door of Mr. *Thorne's* house, and, notwithstanding the zealous testimony of the vestrymen and others who were examined, I am of opinion that such proximity must necessarily create a nuisance of a most disagreeable character. But it was contended by the Defendants that there is already an existing nuisance in this place in consequence of the number of persons who resort to this corner for urinal purposes. I think there has been considerable exaggeration in the evidence of the Defendants in this respect, and it is remarkable that, though frequent complaints were made to the vestry of the nuisance caused by the use for urinal purposes of the place under the gateway, no complaint was ever made of the nuisance in this corner, and the vestry are not, therefore, called on to interfere on those grounds. Granting all that was said by the witnesses as to the mode in which urinals are now constructed so as to avoid their being a nuisance, it must be borne in mind that the construction of a public urinal at this place, with public notice of it, and every policeman who is asked, referring the public to it, would probably bring fifty persons there while one goes at present; and it appears even from the evidence of the Defendants that the public are not very particular in going into these places when they can find convenience outside. [His Lordship then read and commented on the evidence as to this.] The proposed urinal is there-

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fore, in my opinion, calculated to cause an intolerable nuisance to the Plaintiff *Thorne*. It is true that it will be at the back door and not in front, as suggested by Lord Justice *Turner* in Colonel *Biddulph's* case, but that makes no difference, and a man has, in my opinion, the same rights with regard to his back door as with regard to his front door. I acted on that opinion in *Cook* v. *Corporation of Bath* (1), and in *Lyon* v. *Fishmongers' Company* (2), where my decision proceeded on the ground that Mr. *Lyon*, the owner of the wharf, had the same right to the side doors of his wharf as he had to the front, and that every protection he could claim for the front he could claim for the side, unless there were circumstances clearly shewing that he did not require it.

It also appears by the evidence that there is a complete communication through from the front door of Mr. *Thorne's* shop in *Regent Street* to the back, and that in warm weather the back door is kept open. But in addition to the nuisance to the Plaintiff *Thorne*, the urinal will be in close proximity to the entrance of Mr. *Bingley's* cellar doors. When those doors are open, they must actually open if not against the urinal yet so close as to be an inconvenience and a nuisance. [His Lordship then commented on the evidence as to the nuisance to Messrs. *Lewis & Allenby*. Some of their windows looked into the mews and their work-people came in and out by a door into the mews. About fifty or sixty young women would have to pass every day through the passage, almost touching the urinal. There were other places in the mews which, in the opinion of Mr. *Lewis*, would be more suitable. His Lordship, however, doubted whether the annoyance to Messrs. *Lewis & Allenby* would be sufficient to cause the Court to interfere, but it was a very material circumstance when taken in connection with the nuisance which must be occasioned to Mr. *Bingley* and Mr. *Thorne*. His Lordship then proceeded :—]

Therefore, taking all these circumstances into consideration, I am of opinion that the Defendants ought not to be allowed to place the urinal where they propose to place it, and that the Plaintiffs are consequently entitled to the injunction they ask. This view of the case renders it unnecessary for me to say anything about the shutter-box which was so much discussed in the argument and

(1) Law Rep. 6 Eq. 177. (2) Law Rep. 10 Ch. 679.

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in the evidence. Probably Mr. *Bristowe* was right in his contention, that that would be the subject of compensation under the Act.

Many cases were cited, such as *Tinkler* v. *Wandsworth District Board of Works* (1) and *Attorney-General* v. *Metropolitan Board of Works* (2), which were cases of public bodies exceeding their powers, and have therefore no application to this case, where the question is not as to the excess of the powers, but as to the propriety of the mode in which they are proposing to exercise their power.

On the whole, I am of opinion that the Plaintiffs have established their right to the injunction they ask, failing on one ground and succeeding on the other.

Then as to the costs. The Plaintiffs in this case were attacked by the Defendants, who proposed to place the urinal so as to be a nuisance to the Plaintiffs. There has certainly been no vexatious conduct on the part of the vestry, but they have brought this suit on themselves, and the Plaintiffs, in setting up two claims, were only defending themselves. They fail in one and succeed on the other, and the vestry must pay the costs of the suit. The vestry, by having apparently abandoned the claim to the soil of *New Burlington Mews* under precisely similar circumstances, gave the Plaintiffs great encouragement to set up the claim in which they failed, and I cannot draw any distinction as to costs.

C. A.

The Defendants appealed. The appeal came on for hearing on the 16th of November, 1880.

Bristowe, Q.C., and *Gregory Walker*, for the Appellants :—

The Act 18 & 19 Vict. c. 120, s. 88, under which the vestry are acting, empowers them to erect conveniences of this kind in the places which they think proper. It is not disputed that they are acting *bonâ fide*, and we contend that their decision cannot be reviewed. By sects. 58 and 59 the vestry are authorized to appoint committees for the discharge of the various duties vested in them. By sect. 68 all rights incident to sewers are vested in the vestry. Sect. 88 empowers them to erect urinals in

(1) 2 De G. & J. 261. (2) 1 H. & M. 298.

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situations which they deem proper. By sect. 96 all the duties and powers of the surveyors of highways, and the highways themselves, are vested in them. Sects. 225 and 226 provide for compensation and damages for acts done in the exercise of their powers; and sect. 211 provides for appeals to the Metropolitan Board of Works.

[COTTON, L.J.:—That seems to apply only to cases in which orders are made upon householders to do something.]

The first question of fact is whether the ground on which this urinal was erected is vested in the vestry. [The arguments on this point are omitted, as the Court of Appeal gave no opinion upon it.] The Court will not interfere with the statutory powers of the vestry unless they are acting in bad faith: *Coats* v. *Clarence Railway Company* (1); *Tinkler* v. *Wandsworth Board of Works* (2); *Galloway* v. *Corporation of London* (3). The case of *Attorney-General* v. *Conservators of the Thames* (4) is a strong case in our favour.

Glasse, Q.C., and *S. Dickinson*, for the Plaintiffs:—

This is an oppressive exercise of the powers of the vestry, supposing what they are doing to be authorized by the Act; and according to the principle of *Coats* v. *Clarence Railway Company* it ought to be restrained. But we say that, on the proper construction of sect. 88, it is not to be held to authorize a nuisance. It is impossible to contend that the erection of a urinal is necessarily a nuisance, and the mere giving statutory powers to expend the money of the ratepayers in such erections, and to cause a partial obstruction of the public right of way by erecting them, is not to be construed as enabling the vestry to erect them so as to be a nuisance to the owners of adjoining property. The judgments in *Biddulph* v. *St. George's Vestry* (5) are in our favour, the case being one where a serious nuisance is proved.

[The Court here called on *Bristowe* to reply on the question whether the Act empowered the vestry to create a nuisance.]

(1) 1 Russ. & My. 181.
(2) 2 De G. & J. 261.
(3) Law Rep. 1 H. L. 34.
(4) 1 H. & M. 1.
(5) 3 D. J. & S. 493.

Bristowe, in reply:—

The preamble of the Act is in wide terms, and shews that extensive powers were intended to be given to the vestry. This is an improvement connected with drainage. The 67th and following sections give the vestry large discretionary powers as to drainage. By sect. 78 they have powers of making part of private drains. By sect. 80 they can make rates for these purposes. By sect. 82 powers are given them as to drains, privies, and cesspools. Sect. 87 gives them power to fill up ditches. Then comes sect. 88, which empowers them to erect urinals in such situations where they deem such accommodation to be required, they making compensation for any damage. There is provision made for damage done to individuals, and the clause ought, therefore, to receive a wide construction.

[LUSH, L.J.:—The *Public Health Act* of 1875, 38 & 39 Vict. c. 55, s. 39, does not provide for compensation for making urinals, which appears to assume that they might be erected where they would not be a nuisance.]

The case of *Attorney-General* v. *Conservators of the Thames* (1) lays down the principles on which we contend that this case ought to be decided.

[LUSH, L.J.:—There the Act authorized the making erections which would necessarily have been indictable as a nuisance if done without statutory authority.]

In the case of *Mason* v. *Wallasey Board of Health*, the Master of the Rolls treated the vestry as a sort of local parliament from which there is no appeal to the Court. Sect. 211 gives a right of appeal, but that clause does not refer to urinals.

[JAMES, L.J.:—It clearly does not apply to such a case as this. If the vestry had ordered the removal of a private erection of this kind, there would have been a right of appeal under that section.]

In the case of *Hills* v. *Managers of the Metropolitan Asylum District* (2), the case of *Baines* v. *Baker* (3) was not referred to.

(1) 1 H. & M. 1. (2) 4 Q. B. D. 433.
(3) Amb. 158.

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[COTTON, L.J.:—It was considered in the Court of Appeal.

JAMES, L.J.:—A decision by Lord *Hardwicke* that a particular hospital was not a nuisance, is only a determination of a matter of fact.]

The present erection was set up to prevent a nuisance which was complained of by the police, and is an act beneficial to the public. If, however, the Court is against us, the judgment ought still to be varied as to costs, for the principal expense has been incurred in trying the issue whether this was a public place vested in the Defendants, on which the Plaintiffs have failed.

JAMES, L.J.:—

It appears to me that the judgment of the Vice-Chancellor ought to be affirmed. If the erection in question were made by a private landowner on his own soil and freehold, it would seem to be beyond all question a nuisance so grave and so serious that the neighbours would be entitled to apply to the Court for an injunction to restrain it. The question is whether the fact that the thing is done, not by a private owner on his private soil, but by the parish vestry on a place that is said to be a public highway, makes any difference. That depends entirely upon the true construction of the 88th section, which says that it shall be lawful for a vestry to provide certain conveniences in situations where they deem such accommodation to be required, and to supply the same with water, and to defray the expense thereof and any damage occasioned to any person by the erection thereof, and the expenses of keeping them in good order, as expenses of sewerage are to be defrayed. There are no words here that authorize the vestry to commit a nuisance. *Primâ facie* nobody is authorized to commit a nuisance, and nobody is to be held so authorized under an Act of Parliament unless it appears from express words or by necessary implication that the act was to be done or might be done notwithstanding its tending to the creation of a nuisance. In all the Sewage Acts that I am aware of there are express words forbidding the creation of a nuisance. To some extent the omission of those words in this clause is an argument for the Appellants, but I do not think it

sufficient. If private rights are to be interfered with, they must be interfered with by express legislation, and I am of opinion that there is no legislation in this case authorizing the vestry, though they may be called a local parliament, to interfere with those private rights. It is said that any damage sustained would be compensated for under the clause for compensation, but I am of opinion that that clause does not apply to such a case as this. I am of opinion that the true intent and meaning of the 88th section is to authorize and empower the parish vestry, out of their public moneys raised by parish rates, to provide such accommodation, and to that extent, no doubt, the minority must submit to be overridden by the majority; that is to say, with reference to the expenditure of the parish rates for the purpose mentioned in that section, the parish vestry is a competent authority, but with respect to private rights or public nuisances the vestry has no such power. I am of opinion, therefore, that the vestry had just the same power as the trustees of the estate would have had if the settlement under which they acted had contained a similar power, and that they could no more under the colour of this provision make an erection to the nuisance of the neighbours, than the owners of the estate themselves could have done if they had been minded to erect such conveniences upon their own property for the convenience of the public. In my opinion the vestry have exceeded their authority in doing that which, in my opinion, is a nuisance to the neighbourhood. I think, therefore, that we must affirm the decision of the Vice-Chancellor. With regard to the question of costs; the Vice-Chancellor had the whole case before him, we have affirmed his decision, and it is not according to the practice of the Court to interfere with the decision of the Court below as to costs when the case has been before it, and when that case resolves itself into an appeal for costs which we have no right to entertain. The appeal will be simply dismissed with costs.

COTTON, L.J.:—

I am of opinion that the Vice-Chancellor in this case arrived at a correct conclusion. For the purposes of my judgment I assume, without deciding, that this is a public highway. Assuming it to

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be so, is what has been done justifiable? It was contended by the Appellants that as the *Metropolis Local Management Act*, and especially sect. 88, gives to the vestry a discretion as to the erection of these conveniences, and as to the places where they are to be erected and the number to be erected, this Court ought not to interfere with the discretion committed by the Act to the vestry. If the vestry had in this matter exercised a discretion given to them by the Act of Parliament, the appeal would, in my opinion, be right, but the very ground of the decision is that there has been an excess of the power given to the vestry by the Act of Parliament; that in this matter they are acting *ultrà vires* without Parliamentary authority, and have no more power to do this if it be a nuisance than any other person would have who had not any pretence for saying that he was acting under Parliamentary authority. Now I quite agree with the Vice-Chancellor and with Lord Justice *James* that this erection is a nuisance, which, if there be no Parliamentary authority to sanction it, ought to be restrained. Is it, then, authorized by the Act? As I understood one of the arguments of Mr. *Bristowe*, who pressed everything upon us that could be said for the Appellants, it was this, that the selection of the site is left to the board by the 88th section of the Act, and that when the board had once selected a site it was not open to say that in consequence of the selection of the site that which elsewhere might not be a nuisance was a nuisance. In my opinion that argument cannot prevail. In the first place, the expression "in situations where they deem such accommodation to be required," in my opinion points not to the particular position of the urinal but to the neighbourhood, or part of the street or locality where they desire to provide such accommodation. Then we must look to the whole of the section and see whether it justifies their erecting and maintaining a nuisance. It is impossible to say that an urinal or water-closet must necessarily be a nuisance. If it could be made out that such an erection, wherever placed and however guarded, must of necessity be a nuisance, then it would be true that the Act of Parliament had authorized a nuisance, and the Court could not have interfered; but common sense tells us that it cannot be said that no water-closet or urinal can possibly be erected without being a nuisance. Therefore the mere

fact that an urinal is authorized to be erected does not necessarily or by necessary implication give Parliamentary power to do it if it is a nuisance. Power to erect these conveniences is no doubt given to them, but subject to this, that they must not exercise it in such a way as to create a nuisance, because the section contains nothing to exempt them from the general law which prevents any one from erecting or maintaining a nuisance. Large powers are given by the Act to vestries, including powers in some instances to interfere with private rights, and to make orders requiring people to do that which they would not otherwise be compellable to do, and authorizing them to spend the public money in order to do that which they think for the convenience of the public, but subject always to this, that where they are not exempted from the obligations of the law they must comply with those obligations, and not do that which the law considers to be a nuisance. In the present case, it not being necessarily a nuisance to erect or maintain an urinal, and there being nothing in the terms of the 88th clause which enables them to do it if it is a nuisance, the proper construction of this Act of Parliament is to say that, although the vestry are authorized as regards the public expenditure and as regards interference with the public right of passage to erect and maintain urinals, yet they cannot do it if their doing so creates a nuisance.

Probably it is unnecessary to refer to cases, but we were pressed with *Attorney-General* v. *Conservators of the Thames* (1). There, however, the erection complained of by the Attorney-General was a pier in a public navigable river, and the Act of Parliament clearly authorized the conservators to erect piers where they thought it necessary and desirable in that public navigable river, that is, authorized them to erect that which, without Parliamentary authority, would of necessity have been a public nuisance, for any erection in the waterway of a public navigable river would be a nuisance. The only question, therefore, was whether, as regards the public, they had fairly exercised their discretion in choosing this place, or rather whether it was shewn that their discretion had been so unfairly and improperly exercised that they could not be considered as exercising their Parlia-

(1) 1 H. & M. 1.

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mentary powers. The other case which has been referred to, *Baines* v. *Baker* (1), was an application to restrain the erection of a small-pox hospital which had not yet been built. The erection could only be restrained if a small-pox hospital, when erected, must of necessity be a nuisance, and Lord *Hardwicke* only decided that he could not say beforehand that it must of necessity be a public nuisance. If when it had been erected it had been so conducted as to prove a public nuisance, there would have been a very different question, viz., that which arose in the case of the *Hampstead Hospital.*

In the present case all that it is necessary to decide is this, that this Act does not authorize urinals to be erected so as to be a nuisance, and we agree with the decision of the Vice-Chancellor that the maintenance and use of this urinal is a nuisance.

LUSH, L.J.:—

I am of opinion that the judgment of the learned Vice-Chancellor was right upon both points. It has not been imputed to the vestry that they were actuated by any improper motive in fixing upon this site for the erection of the urinal. It cannot be doubted that that spot was selected by them because, in the honest exercise of their discretion, they thought it the most convenient and fit spot for the purpose. Therefore the only question for us is, whether or not they have exceeded their statutory authority by placing an urinal in that spot. Now it is not easy at first sight to define the exact meaning of this 88th section. Its terms are wide—so wide that it strikes one at once, upon the reading of it, that it must receive some limitation. It says that it shall be lawful for every vestry and district board to provide and maintain urinals, &c., in situations where they deem such accommodation to be required, and to supply the same with water, and to defray the expenses thereof, and any damage occasioned to any person by the erection thereof, and the expense of keeping the same in good order, as expenses of sewerage are to be defrayed. Some limitation must obviously be put upon that clause, for it obviously cannot have been intended to give the vestry any power to erect an urinal within a private inclosure.

(1) Amb. 158.

What other limitation, if any, the section is to receive, we may, I think, be better able to decide if we consider what was the state of the common law upon this subject before the Act passed. It was well established at common law that an indictment lay against any person or body, whether a vestry, or the trustees of a turnpike road, or a private individual, who obstructed any part of a public highway; and it was not a sufficient defence that the obstruction was for a purpose more beneficial to the public than the use of that part of the road would have been. You could not divert a road so as to get rid of an inconvenient angle. You could not put anything whatever upon the highway, and justify it by saying, "It does far more good to the public than it does harm." A telegraph company could not lay a line of posts along a public highway without the authority of Parliament. I remember, years ago, a very singular case of that kind, in which I myself was engaged. A telegraph company, while its Act was in the House, began, in anticipation of its passing, to lay down its wires, and erected, with the consent of the trustees of a turnpike road, a line of telegraph posts. Another company indicted them for the nuisance, and they were found guilty, and judgment would have been passed requiring them to take up the posts and abate the nuisance; but, fortunately for them, on the very day before the time came for moving for judgment, the statute received the royal assent, so that what they had done was authorized. I mention that by way of illustration to shew how strict the law was against the occupying by any permanent structure any part of that which had been dedicated to public traffic, however beneficial to the public such structure might be, and whatever collateral advantages might have accrued to the public from it.

The situation of the vestry, therefore, but for this 88th section and the other enactments of this Act, was this: They could not have erected any urinal in a public street, and this Act authorizes them to do so. There are other provisions of the same kind in the Act. Thus there is an express power (sect. 130) to erect lamp-posts anywhere they like in a public highway. There is another clause (sect. 122) which empowers them to authorize the erection of hoardings for a longer or shorter time while buildings are in course of erection. That could not be done to the same

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extent without statutory powers. Then the 108th section, which I believe has turned out very useful, authorizes them to place what are called refuges in the middle of a road. Another clause authorizes drinking fountains. That they could not do without the authority of Parliament. I think that these considerations afford a key to the construction of this clause, and suggest to us what its true limitation is. The vestry are authorized to deprive the public of a portion of their right to traverse every part of the public highway in return for the accommodation which the vestry are authorized to give; and the section is confined to that. The intention is that, as these erections were for the public accommodation, the public right should be infringed to the extent necessary for the affording of that accommodation. That, in my judgment, is the true scope of the Act, and the extent of the enactment, therefore, is to authorize the erection of these conveniences upon a public thoroughfare and highway, when public rights only would be interfered with, not necessarily in every place which is public—every court, or alley, or passage—but in places where, but for the statutory powers, the erection of them would have been an obstruction to the public highway, and an indictable offence. The enactment does not contemplate any private place, for, as I have said before, it is impossible to conceive that the vestry could have put up this urinal in a private inclosure, nor can they put it in a place where it would obstruct a private right of way belonging to an individual. There is nothing whatever in the section to suggest that it authorizes interference with any private right. It amounts to this, that the vestry are to be authorized to take away from the public, in return for the accommodation which the Act enables them to offer, part of the right which the public enjoyed at common law of demanding that every foot of a public highway should be kept open for them to pass over. If that be so, it at once decides this question against the vestry. This is a *cul-de-sac* in which an urinal is a private nuisance, and I am of opinion, for the reasons I have mentioned, that the authority of the vestry extends only to erecting these places upon the public highways, where no such nuisance would be occasioned.

I will say one word about the provision in the 88th section,

that the vestry may defray "any damage occasioned to any person by the erection thereof." I confess that during the argument my mind fluctuated upon the meaning of those words, as well as upon the general intention of the Act, and it occurred to me at one time that the word "damage" there meant compensation; but I quite assent to what has been suggested by Lord Justice *Cotton*, that it cannot have, and was not intended to have, that extensive meaning. I am fortified in that respect by referring to the *Public Health Act*, 1875, 38 & 39 Vict. c. 55, s. 39, which enacts that "Any urban authority may, if they think fit, provide and maintain, in proper and convenient situations, urinals, water-closets, earth-closets, privies, and ash-pits, and other similar conveniences for public accommodation," without saying a word about damage. As I say, that fortifies the view which I have ultimately taken, in conjunction with my learned brethren, that the word "damage" in sect. 88 does not give the clause a wider sense than it would otherwise have, but merely means any direct damage by reason of the erection of the thing itself. The result, therefore, is that this 88th section authorizes the board to take away so much of the public right of transit as they had before in highways and in streets, in return for the accommodation which the Act authorizes them to give, and which this structure presumably does give. That is the whole extent of the statutory power, and therefore in putting up the erection in this spot, though it is a public place, they have exceeded their powers, because it injuriously affects private rights.

The appeal being dismissed with costs, Mr. *Glasse* asked that the cost of shorthand writer's notes of the evidence might be allowed. He referred to *Hills* v. *Managers of Metropolitan Asylums District* (1).

JAMES, L.J.:—

It requires a very strong case to induce us to give the costs of the shorthand writer's notes. This is not a case of that kind.

COTTON, L.J.:—

In the case to which you refer I was one of the Judges who sat

(1) 49 L. J. (Q.B.) 668. WM (1880) 98

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on the hearing of the appeal, and we had to consider for days every word of the evidence on both sides. It was a very special case.

Application refused.

Solicitors for Plaintiffs: *Allen & Son.*
Solicitors for Defendants: *Janson, Cobb, & Pearson.*

C. A. 1879 M. R. *June* 24. C. A. 1880 *June* 15, 18, 19, 21, 22; *Nov.* 30.

ATLANTIC MUTUAL INSURANCE COMPANY *v.* HUTH.

[1875 A. 80.]

Shipping—Wreck—Sale by Master—Necessity.

On the 19th of April an Austrian ship with a valuable cargo on board ran upon a rock on the eastern side of *Algoa Bay*, distant fifty miles by sea and about eighty by land from *Port Elizabeth*. The Austrian consul at *Port Elizabeth* came to the spot, and, there being no hope of getting the vessel off, he advised the master to sell her with the cargo. The master accordingly advertised the ship and cargo for sale, and they were sold in one lot by auction on the 30th of April for £9500, after a brisk competition. The purchaser got some part of the cargo out of the wreck, but on the 19th of June the ship went to pieces with the rest of the cargo on board. The owners of the cargo having abandoned it to the underwriters as a total loss, the underwriters filed their bill to have the goods which had been brought to land delivered to them as not having been effectually sold. The master had not gone to *Port Elizabeth*, nor endeavoured to procure funds to enable him to save the cargo; nor had he made any effort to induce any persons to undertake the salvage of the cargo. Several witnesses at *Port Elizabeth* deposed that in their opinion no person could have been induced to undertake the salvage; others gave their opinion that offers to save the cargo could have been obtained if a large percentage of the net proceeds had been offered. There was a good deal of evidence to shew that, in the opinion of persons on the spot, the course which had been adopted of selling the wreck and cargo was the most advisable one in the interest of all parties concerned:—

Held, by the Court of Appeal (affirming the decision of the Master of the Rolls), that no such necessity was proved to have existed as would make the master the agent of the owners of the cargo to effect a sale; that the sale was void; and that the Plaintiffs were entitled to the cargo saved, subject to a proper allowance for salvage and other expenses.

THE *Austrian* barque "*Jupiter T.*" sailed in 1875 from *Singapore* for *New York*, having on board a valuable cargo consisting chiefly

of tin, pepper, gambia, and copal. The Plaintiffs were insurers of the cargo, which belonged to different owners, the ship being a general ship.

On the evening of the 19th of April, 1875, the ship was wrecked upon a rock off *Point Padrone*, on the eastern side of *Algoa Bay*. The place was distant from *Port Elizabeth* fifty miles by sea and about eighty miles by land. The captain and crew got ashore on the following day, but there was no prospect of getting the ship off the rock. The Austrian consul at *Port Elizabeth*, and other persons, came to the place on the morning of the 22nd or 23rd, and the captain consulted the consul as to what he ought to do. The consul had the vessel surveyed by two qualified persons, who, however, only inspected her from the shore, and he advised the captain to sell the ship and cargo. The captain accordingly advertised the ship and cargo for sale by auction. The sale took place on the 30th. There was a brisk competition, and the ship and cargo were sold for £9500. The weather at the time of the sale was fine, and the purchasers at once commenced proceedings to get out the cargo. They succeeded in landing a considerable part of it, but on the 19th of June, while a large part was still on board, the ship went to pieces.

Neither the owner of the ship nor any of the owners of the cargo had any agents at *Port Elizabeth;* nor had the captain any money in hand to enable him to pay the expenses of saving the cargo. He did not go to *Port Elizabeth*, nor make any endeavour to obtain funds to enable him to pay for salvage; nor did he endeavour to induce any persons to undertake the salvage of the cargo. A great deal of evidence was entered into on the question whether such endeavours could have been of any use. Several witnesses at *Port Elizabeth* deposed that in their opinion no one at that place would have advanced funds without security. Several also deposed that in their opinion, if the captain had advertised for tenders to salve the cargo, no tenders could have been obtained. Some witnesses took a more favourable view of the circumstances. *H. B. Deare*, a merchant of *Port Elizabeth*, deposed, on cross-examination, that if a sufficient interest in the cargo saved had been offered, funds would probably have been forthcoming. *A. L. Blackburn*, another merchant of *Port Elizabeth*, stated that if the

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captain had asked his firm to work the salvage he would have entertained the offer, provided a percentage of the net proceeds were offered sufficiently large to tempt him. He said that the percentage would be so large that he did not think the captain would have been justified in giving it, and went on to say that his firm would have provided the funds and paid the expenses on receiving half the net proceeds. He considered that in the interest of all persons concerned the course which had been adopted of selling the vessel and cargo was the wisest one to take, and this was the opinion of most of the witnesses. It appeared that saving the cargo was a matter of difficulty and danger, and that it was known from the first to be very uncertain whether the ship would hold together long enough to allow it to be saved.

A considerable part of the tin recovered from the ship was consigned by the purchasers to the Defendants, *Huth & Co.*, in *England*. The owners of the cargo having abandoned it to the underwriters as upon a total loss, the Plaintiffs filed their bill, which, as amended, was against *Huth & Co.*, the captain, the consul, and the purchasers, asking that it might be declared that the tin remitted to *England* was the property of the Plaintiffs, and for consequential relief. The tin was subsequently sold, and the proceeds deposited in a bank to abide the result of the action. The bill was dismissed as against the consul before the trial.

The case was heard before the Master of the Rolls on the 24th of June, 1879.

The Master of the Rolls by his judgment declared that the sale was void in law, and that the tin remitted to the Defendants *Huth* belonged to and was the property of the Plaintiffs. A reference to Chambers was directed to ascertain what was proper to be paid to the Defendants, other than the captain and consul, for the salvage of the cargo, and for their expenses in and about landing the cargo, and its transmission from the wreck to *Port Elizabeth* and to *England* respectively, for freight, and for the sale of the cargo, including the commission payable to the Defendants *Huth* in respect of the sale. Directions were given for the payment of the amount so ascertained to the Defendants, and for payment of the residue to the Plaintiffs; and the Defendants, other than the master and the consul, were ordered to pay

the Plaintiffs' costs of the action. The bill was dismissed without costs as against the master.

The Defendants, other than the captain and the consul, appealed, and the appeal came on to be heard before *James, Cotton,* and *Thesiger,* L.JJ., on the 15th of June, 1880.

Chitty, Q.C., *Marten,* Q.C., and *Romer,* for the Appellants :—

We rely on the rules, as to the power of a master to sell, which are laid down in *Australasian Steam Navigation Company* v. *Morse* (1), which case is approved by Lord Justice *Brett* in *Acatos* v. *Burns* (2). Where something has occurred making it impossible for the goods to be carried on in their ordinary course, and the master must either enter into a salvage contract or sell, he must have a discretion which course to adopt. This principle is applied by Lord *Stowell* in *The Gratitudine* (3). Necessity must be understood with reference to the information possessed by the master. Suppose a ship in extreme danger of foundering makes for a port before which there is a bar, and the master receives information, on which he relies, that the depth of the water is less than it really is, he surely could not be pronounced wrong in throwing goods over to lighten the ship, although that would not have been necessary if he had known the real depth. In the case of *The Karnak* (4), it is laid down that "necessity" means a high degree of need—a need which arises when choice is to be made of one of several alternatives under the peril of severe loss if a wrong choice should be made :—

[JAMES, L.J. :—Have you found any case bearing on this question where there has been a total abandonment ?]

We have not.

[THESIGER, L.J., referred to *Idle* v. *Royal Exchange Assurance Company* (5) and *Read* v. *Bonham* (6).]

The evidence here is strong that the merchants of *Port Elizabeth* would not have undertaken to salve the cargo. In *The Austra-*

(1) Law Rep. 4 P. C. 222.
(2) 3 Ex. D. 282, 291.
(3) 3 Rob. 240, 258.
(4) Law Rep. 2 P. C. 505, 512.
(5) 3 Brod. & B. 151 ; 8 Taunt. 755.
(6) 3 Brod. & B. 147.

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lia (1) it was held that the circumstances of the place, which made it difficult to obtain money on bottomry, must be taken into account in determining whether there was "necessity." The case of *The Margaret Mitchell* (2) shews that a combination of circumstances making a sale practically the only available course are sufficient without absolute compulsion.

[THESIGER, L.J.:—What did the Master of the Rolls think that the master ought to have done?]

There is some difficulty in answering that question. He seems to have thought that the master might trust to the chance of persons making an offer to salve the cargo. The master must look to the interests of all parties, and not take a course which would be for the benefit of owners of the imperishable parts of the cargo, but prejudicial to the owners of the perishable part.

Roxburgh, Q.C., *Benjamin*, Q.C., Dr. *Phillimore*, and *Stubbs*, for the Plaintiffs:—

The cases shew that only extreme necessity can justify the master in selling: *Hayman* v. *Moulton* (3). In *Underwood* v. *Robertson* (4) the existence of a lien for salvage which the master could not pay was held not to justify a sale. The rule is strongly laid down in *Freeman* v. *East India Company* (5), *Acatos* v. *Burns* (6), and *The Segredo* (7). So in the American authorities: *Hall* v. *Franklin Insurance Company* (8); *Kent's* Comm. (9). In *The Eliza Cornish* (10) it was clearly laid down that the master has no discretionary power to sell, and can only sell in a case of urgent necessity.

[THESIGER, L.J.:—If the master must either sell or obtain salvage service, and takes the course which competent persons advise to be the only prudent one, is not that a case of necessity?

JAMES, L.J.:—What do you say the master ought to have done?]

(1) Swab. 480.
(2) Ibid. 382.
(3) 5 Esp. 65.
(4) 4 Camp. 138.
(5) 5 B. & A. 617.
(6) 3 Ex. D. 282.
(7) 1 Spinks, 36.
(8) 9 Pick. 466.
(9) Vol. iii. p. 237.
(10) 1 Spinks, 46, 47.

He ought to have advertised the loss, and seen whether parties could not be induced to attempt salvage in the ordinary way, trusting to getting a fair allowance from an admiralty Court if no agreement could be come to. A captain has extensive powers of agreeing for remuneration as to salvage. He may give part of the cargo for it: *Marvin's* Law of Wreck and Salvage (1). The cases of *The Theodore* (2) and *The Firefly* (3) shew under what circumstances agreements for that purpose by a master will be upheld. We say that salvage was possible in this case, and that the sale was so negligent that it cannot be held to have been made *bonâ fide*. The evidence shews that a body of salvors might have been got together, and anything salved could have been sold on shore at a good price. Even if merchants would not undertake salvage that is not sufficient to support a sale as made under urgent necessity: *Hall* v. *Franklin Insurance Company* (4); *Idle* v. *Royal Exchange Assurance Company* (5); *Cobequid Marine Insurance Company* v. *Barteaux* (6); *Acatos* v. *Burns* (7).

Chitty, in reply, referred to *The Karnak* (8); *The Glasgow* (9); *Arnold* on Insurance (10); *Abbott* on Shipping (11).

Thesiger, L.J., having died before judgment was delivered, the parties agreed, without prejudice to the right of appeal, to accept the judgment of the survivors of the Judges who had heard the case.

Nov. 3, 1880. The judgment of *James* and *Cotton*, L.JJ., was now delivered by

COTTON, L.J.:—

In this action the insurers of the cargo of a ship called the *Jupiter T.* filed a bill against the purchasers of the cargo to have the purchase set aside and the purchasers treated as salvors only.

(1) Page 149.
(2) Swab. 351.
(3) Ibid. 240.
(4) 9 Pick. 466, 482.
(5) 3 Brod. & B. 151.
(6) Law Rep. 6 P. C. 319.
(7) 3 Ex. D. 282.
(8) Law Rep. 2 P. C. 505.
(9) Swab. 145.
(10) 5th Ed. vol. i. pp. 324, 359.
(11) 12th Ed. p. 312.

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The Master of the Rolls made a decree accordingly, and against it the purchasers appealed. The *Jupiter T.* was an Austrian vessel, and, on a voyage from the *Straits Settlements* to *New York*, it was, on the 19th of April, wrecked on a rock off *Point Padrone*, on the eastern side of *Algoa Bay*. The place of the wreck was distant from *Port Elizabeth* fifty miles by sea and about eighty miles by land.

The captain and crew got ashore on the day after the wreck, and there never was any prospect of getting the ship off the rocks. The cargo was a valuable one, and consisted principally of a large quantity of tin, some spices, and other articles. News of the wreck soon reached *Port Elizabeth*, and various persons, including the Austrian consul, hastened to the scene of the wreck. The captain consulted the Austrian consul. He (after a survey of the vessel, made by two persons who only viewed it from the shore) advised the captain to sell the ship and cargo. The captain acted on this advice, and on the 30th of April the ship and cargo were sold by auction. On the day of sale the weather was very fine, and the reports of the value of the cargo had attracted many persons to the sale. The competition was brisk, and the ship and cargo were sold for £9500. The purchasers saved from the wreck a considerable portion of the cargo. But on the 19th of June, while a large part of the cargo was still in the wreck, the ship went to pieces. The question is whether the sale can be sustained as effectual to bind the owners of the cargo.

The master was made a party to the action, but the Master of the Rolls dismissed the bill against him, and the conclusion from this, and from the evidence in the cause, in our opinion, is, that the master acted *bonâ fide*, and did what he thought best for the interest of all concerned. The question, however, is whether under the circumstances he had power to bind the owners by a sale. There is no decision nor any direct authority as to the power of the master of a wrecked vessel to sell the cargo while in the wreck. The cases in which the right of the purchasers of cargo from the master has come in question, have been where the cargo has been on shore. The case of *Idle* v. *Royal Exchange Assurance Company* (1) was indeed pressed upon us as a case of

(1) 8 Taunt. 755.

the sale of a vessel and of the cargo while still on board. In that case there had been such a sale, but the only point which arose and was decided (the sale of cargo not being questioned by the owners) was the right to recover on a policy of insurance of the freight, which depended on the question whether the master had properly abandoned the voyage. Undoubtedly there are expressions in the judgment which favour the Appellants' contention in the present case, but it appears from a note to *Read* v. *Bonham* (1) that when the case came on in error a *venire de novo* was ordered on the ground that it did not appear from the special verdict that the sale was necessary. This cannot be treated as an authority in favour of the Appellants.

The rule laid down in the cases where the sales of cargo have been questioned, is, that the master becomes agent for sale of the cargo, that is, has authority to sell so as to bind the owners of the goods entrusted to him for a different purpose, namely, carriage to their port of destination, only where there is a necessity for that course, and that it lies on those who claim title to cargo, as purchasers from the captain, to prove that this necessity clearly existed; further, that it is not sufficient to prove that the master thought he was doing the best for all concerned, or even that the course adopted was, so far as can be ascertained, the best for all concerned. (See *Tronson* v. *Dent* (2); *Acatos* v. *Burns* (3).) The principle is, that the master is authorized by the owners only to convey the goods to the port of discharge, and that nothing but necessity can authorize him to adopt any other course of action. We do not enter into the question whether what will justify a sale is to be called extreme or stringent, or the strongest necessity, or commercial necessity. In our opinion purchasers of cargo from a master cannot justify the sale unless it is established that the master used all reasonable efforts to have the goods conveyed to their destination, and that he could not by any means available to him carry the goods, or procure the goods to be carried, to their destination as merchantable articles, or could not do so without an expenditure clearly exceeding their value after their arrival at their destination. Here the sale was of the ship

(1) 3 Brod. & B. 151, n. (2) 8 Moo. P. C. 419.
(3) 3 Ex. D. 282.

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ATLANTIC MUTUAL INSURANCE COMPANY v. HUTH.

and cargo as an entirety, and a large and valuable part of the cargo was tin, which, if saved from the wreck, would have been practically uninjured, and certainly capable of being sent on in a merchantable state. The question therefore is, whether it is established that the master could not, with the means available to him, have landed, or procured to be landed, at least this portion of the cargo.

The owner of neither ship nor cargo had any agent at *Port Elizabeth*, and the captain had no money at his command to enable him to hire men or vessels and other appliances necessary to save the cargo. The Appellants rely on the evidence given by divers witnesses, to the effect that no person or firm in *Port Elizabeth* would, without security (which the master could not give), have supplied him with the funds necessary to save the cargo from the wreck. There were also several witnesses who said that, in their opinion, if the master had advertised for persons to save the cargo, no tenders would have been obtained. But there are witnesses who express a somewhat different opinion, especially *Henry Brutton Deare* and *Alfred Blackburn*. *Deare* says that if an interest in the cargo saved had been offered, funds would probably have been forthcoming, and *Blackburn* says his firm would have worked the salvage if the percentage offered had been sufficient to tempt them, and suggests half the cargo salved as a percentage which he would have required. It is true he says the percentage would have been so large that he did not think the captain would have been justified in giving it. But this is only his opinion as to what it would have been advisable for him under the circumstances to do, and this is not the question on which the decision of the present case must depend. The captain never went to *Port Elizabeth*, and made no effort to procure funds to enable him to save the cargo, or to induce others to undertake the salvage. The purchasers shewed that they were willing to try to save the cargo, and to pay £9500 on the terms of being entitled to the wreck and the cargo saved, and the competition at the sale, and the circumstance that, immediately on the fact of the wreck being known at *Port Elizabeth*, several firms sent representatives to the wreck, in our opinion, shew that the merchants at *Port Elizabeth* were not deficient in speculative

enterprise. It is, in our opinion, under these circumstances, impossible to hold that it is established that the captain could not have induced some person to undertake the salvage of the cargo. Certainly the master did not use all means within his power, or make any effort either to procure funds for enabling him to save the cargo, or to induce others to save the cargo. For both reasons, we are of opinion that it is not shewn that there was such a necessity for the sale as would authorize the master to sell or make him the agent of the owners for that purpose.

We have dealt with the case as if the sale had been of cargo only and the cargo all belonged to the same owner. In fact, the sale was of wreck and cargo, and this ship was a general ship, in which the different portions of the cargo belonged to different owners. What was in substance sold was the chance of recovering the cargo, and the chances of recovering the several portions thereof were very different. It is difficult to see how, as against the owners of the goods practically not perishable, the master could under any circumstances justify the sale, in one mass, of the chances of saving both the perishable and non-perishable portions of the cargo, and the vessel.

In our opinion the appeal fails, and must be dismissed.

JAMES, L.J.:—

From what Lord Justice *Thesiger* said to me during the argument, I believe that his opinion would have been the same.

Solicitors for Plaintiffs: *Stokes, Saunders, & Stokes.*

Solicitors for Defendants: *Hollams, Son, & Coward.*

C. A.
1880
Dec. 9.

Ex parte BREULL. *In re* BOWIE.

Debtor's Summons—Jurisdiction of Court—Residence of and carrying on of Business by Debtor—Bankruptcy Rules, 1870, *r.* 17.

Held, that a debtor, who was employed as a clerk in a bank, the office of which was within the district of the *London* Bankruptcy Court, was, within the meaning of rule 17 of the Bankruptcy Rules, 1870, "carrying on business" within the district of that Court, and that consequently that Court had jurisdiction to grant a debtor's summons against him.

The debtor's private residence was in one of the suburbs, outside the district of the *London* Court:—

Held, by *James*, L.J., that he was also, within the meaning of rule 17, "residing" within the district of the *London* Court.

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

On the 13th of July, 1880, *S. Breull* served a debtor's summons, issued out of the *London* Bankruptcy Court, upon *J. H. Bowie*. The debt claimed had been contracted in the city of *London*.

Bowie was a clerk in the employment of a bank, the office of which was in the City. He lived with his mother at *Beckenham*, outside the district of the *London* Court, going from there every morning to the bank to discharge the duties of his employment, and returning home in the afternoon. The summons was served on him at the office of the bank, which was stated in the summons as his address.

The Registrar dismissed the summons for irregularity, on the ground that at the date of its issue the debtor did not reside within the district or jurisdiction of the *London* Court.

The summoning creditor appealed.

Winslow, Q.C., and *Bigham*, for the Appellant:—

The debtor is fairly described, within the meaning of rule 17 of the Bankruptcy Rules, 1870 (1), as residing where he carries on his daily avocation.

(1) Rule 17: "A debtor's summons . . . . may be granted by the *London* Bankruptcy Court if the debtor resides or carries on business within the district of that Court; and when the debtor neither resides nor carries on business within the district of that Court, it may be granted by the Court within the district of which the debtor resides or carries on business."

[JAMES, L.J., referred to *In re Williams* (1).]

A man's residence is the place where he is most likely to be found: *Common Law Procedure Act*, 1852, s. 6; *Ablett* v. *Basham* (2); *Bills of Sale Act*, 1854, s. 1; *Blackwell* v. *England* (3).

Regard must be had to the object of the rule. A debtor's summons must be served within business hours. All the Bankruptcy Courts are branches of one Court: *Bankruptcy Act*, 1869, s. 80, sub-s. 6; and the object of the rule is merely to determine which branch is to have jurisdiction: *Ex parte Pascal* (4). The object of the rule would be defeated if a debtor was to be taken to the Court of a district different from that in which his debt was contracted, and to which he comes every day to carry on the business of his life.

Moreover, the debtor in the present case may be fairly said to "carry on business" in the city of *London*. "Business" does not necessarily mean buying and selling, or the business of a principal.

[JAMES, L.J.:—I suppose the manager of a joint stock company carries on business.

LUSH, L.J.:—The rule does not say "his business."]

McIntyre, Q.C., and *G. A. Vennell*, for the debtor:—

The debtor neither resides nor carries on business within the district of the *London* Court. He clearly resides in the suburb where he lives.

[JAMES, L.J.:—A man may have several residences.]

Blackwell v. *England* was a case under sect. 1 of the *Bills of Sale Act*, 1854, which required that the affidavit filed with the bill of sale should describe the "residence and occupation" of the grantee; it said nothing about the place where he carries on business.

[LUSH, L.J.:—The object there was to identify the man, so that inquiries might be made about him.

(1) Law Rep. 8 Ch. 690.
(2) 5 E. & B. 1019. 2 Jur N S. 285.
(3) 8 E. & B. 541. 3 Jur NS 1302.
(4) 1 Ch. D. 509.

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COTTON, L.J.:—Rule 17 seems to assume that carrying on business is not the same thing as residence.]

Under the *Bills of Sale Act* there was no question about jurisdiction; the question was as to identification. In *Maybury* v. *Mudie* (1) it was held that in an affidavit verifying a plea in abatement for non-joinder of a co-contractor, it was not sufficient to state the place of business of the co-contractor. If a man is moving about continually it may well be that his residence is at the place where you can catch him. That was the case in *In re Williams* (2). It cannot be properly said that the present Respondent resides at the bank. A man's residence means his house, his domicil, the place where his goods and chattels are. The rule requires that this should be within the district of the Court which grants the summons.

Nor can it be properly said that he carries on business within the district of the *London* Court. The duties of a salaried clerk are not a "business"; they would be properly described as an "occupation." Rule 17 refers to a man's business, a business which he carries on as a principal, not as an agent for some one else: *Ex parte Charles* (3).

[LUSH, L.J.:—The Act is not confined to traders.]

The words should be construed strictly. It has been held with reference to the jurisdiction of the Mayor's Court of *London* that a railway company carries on its business only where its principal station is situate, though it has a station within the district of the Mayor's Court at which a considerable portion of its business is transacted; *Le Tailleur* v. *South Eastern Railway Company* (4). To the same effect are *Brown* v. *London and North Western Railway Company* (5) and *Shiels* v. *Great Northern Railway Company* (6), with reference to the jurisdiction of County Courts.

JAMES, L.J.:—

I am of opinion that this appeal ought to succeed. There are cases in which it has been judicially decided, and I think rightly,

(1) 17 L. J. (C.P.) 95.
(2) Law Rep. 8 Ch. 690.
(3) Ibid. 13 Eq. 638.
(4) 3 C. P. D. 18.
(5) 4 B. & S. 326.
(6) 30 L. J. (Q.B.) 331.

that the words "residence" and "business" have no actual definite technical meaning, but that you must construe them in every case in accordance with the object and intent of the Act in which they occur. What is the object and intent of this rule with regard to the distribution of business between the *London* Court of Bankruptcy and the Provincial Courts? The only object, as it appears to me, which can be predicated is that a debtor is to be sued in what may be called his natural forum, that he is not to be taken away from the forum which is the most convenient to him to another forum about which neither he nor his creditors know anything. Having regard to the object and intent of the rule, and to the fact that the words "residence" and "business" are elastic words, and that it is only necessary that the case should be brought within one of the two alternatives—residence or carrying on business within the district—I am of opinion that a man may fairly be said to reside where he is to be found daily. Certainly this would be so if he had no fixed sleeping place. And I think it is not the less so if he happens to sleep always at his mother's house or elsewhere. It is not, however, necessary to deal with this point, for I cannot doubt that for all commercial purposes, in the language of commercial men, this debtor does carry on business in the city of *London*. His business in life is that of a bank clerk, and it is not the less his business because he receives a fixed salary for it. He is really and truly, for all commercial purposes, carrying on business in the city of *London*. I am not sorry that this case has arisen for decision, for I think that any narrower construction of the words would lead to great inconvenience and mischief, whereas no injury can result to any human being from the construction which we have adopted.

COTTON, L.J.:—

I am of the same opinion. I quite agree that such words must receive a construction in accordance with the object of the Act in which they are found. They are ambiguous words, and may have different meanings according to the position in which they are found. I prefer to base my decision on the ground that the debtor carries on business within the district of the *London* Court.

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I do not intend to decide that he does not reside there, but I am clearly of opinion that he carries on business in the City. It is said that a man does not carry on business unless he is a principal, but I do not see that that is necessary. In ordinary language a man is said to carry on business, whether he be a principal or not. If I had to decide whether this man's employment was more properly described as a "business" or an "occupation," I might think that the latter would be the more appropriate term. But "business" is the larger term, and I think it includes his employment.

LUSH, L.J.:—

I am entirely of the same opinion. The words in question are susceptible of a wider or a narrower interpretation, and in order to interpret them we must have regard to the object and intent of the rule; and I cannot doubt that the object and intent was this, that the debtor was not to be put to needless expense and inconvenience by being taken away to a Court at a distance when there is a Court within his own district to which he and his creditors can resort. All the Courts of Bankruptcy have exactly the same jurisdiction. It cannot, I think, be intended that the words "carries on business" should be confined to persons carrying on business on their own account as principals. That would leave out a large number of persons who are engaged in business in the city of *London*. I think that a man carries on business at the place where he is to be found during the business hours of the day. In the present case the employment of a banker's clerk is the business of the debtor's life; he carries it on in the city of *London*, and the *London* Bankruptcy Court is his natural forum, though he resides with his mother in another district. The cases relating to railway companies which have been cited have no application to the present question; they are only decisions that a railway company carries on its business where its principal seat of business is situate, and not at every station it may have throughout *England*. It carries on its business at the place where a creditor who wanted to get his debt paid would go to ask for it, the place where the persons who manage its business are to be found.

JAMES, L.J.:—

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We allow the appeal only on the ground that there is jurisdiction. The case will go back to the Registrar to be heard on its merits.

Solicitors for Appellant: *W. W. Wynne & Son.*
Solicitor for Debtor: *F. Clift.*

WYE VALLEY RAILWAY COMPANY *v.* HAWES.

C. A. 1880 V.-C. H. *Nov.* 20. C. A. *Dec.* 15.

[1879 W. 319.]

Practice—Third Party Notice—Ex parte Application—Discretion of Court—Rules of Court, 1875, *Order* XVI., *rr.* 18, 20, 21.

An application by the Defendant in an action for leave to serve a third party notice under Order XVI., rule 18, ought to be made on notice to the Plaintiff, and not *ex parte*.

In an action by a company against its directors and others, seeking to make the Defendants personally liable in respect of certain dividends alleged to have been improperly paid out of capital, the Defendants applied under Order XVI., rule 18, for leave to serve third party notices on all the shareholders of the company, 450 in number, on the ground that if they, the Defendants, were held liable, they would have a right over against the shareholders to recover from them the sums received by them by way of dividend:—

Held (affirming the decision of *Hall*, V.C.), that the granting of the leave asked for would materially embarrass the Plaintiffs in the conduct of their action, and that, therefore, the Court in the exercise of its discretion ought to refuse the application.

THIS action was instituted in August, 1879, against the five directors of the *Wye Valley Railway Company*, the contractor and the financial agents, seeking, *inter alia*, a declaration that the Defendants were liable to repay to the company a considerable sum of money which it was alleged had, under an arrangement between the directors and the contractors, been improperly paid to the preference and other shareholders by way of dividend out of capital. These shareholders were 450 persons, and it was alleged by the Defendants that they, the shareholders, had notice of the circumstances under which the arrangement now complained of had been entered into.

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The directors were advised that if they were held liable they would have a right to be indemnified by the shareholders, and to recover from them the sums which they had received as dividend, and accordingly took out a summons (which was adjourned into Court) asking for leave, under Order XVI., rule 18, to issue and serve upon all the past and preference shareholders to whom any part of the sum of money in question had been paid by way of interest or dividend, a notice claiming to be indemnified by such shareholders against all liability which the applicants might be under to the company in respect of the sums so paid.

Romer, for the summons :—

The first question is whether an application for leave to serve notice on third parties under Order XVI., rule 18, ought to be made *ex parte* or on notice. It is a proceeding altogether distinct from a notice under rule 17, with which rule 19 may be read, and which applies where questions are to be determined "between the plaintiff, defendant, and any other person." The service of a notice under rule 18, which is to be read with rules 20 and 21, is for the purpose of preventing the party served from afterwards denying the validity of the judgment, on the ground that the action has been improperly defended, or improperly compromised, and it does not in any way prejudice or affect the position of the plaintiffs in the action, and therefore the application for leave to serve such notice may be made *ex parte*: *Seton* on Decrees (1); *Wilson's* Judicature Acts and Rules (2); *Treleven* v. *Bray* (3).

It is only when the third party appears, which is seldom the case, and it is obvious that the third parties will not appear here and dispute their own company's claim, and further proceedings are taken under the subsequent rules of the same Order, that any notice to the plaintiffs is necessary.

Whitehorne, for the Plaintiffs :—

There is a preliminary question whether the application ought to be heard *ex parte*, as the words of the rule may mean *ex parte*

(1) 4th Ed. p. 10. (2) Page 183.
(3) 1 Ch. D. 176.

as against third parties but not as against the Plaintiffs, and I submit that there ought to be notice to the Plaintiffs that the application would be made. In *Treleven* v. *Bray* (1), the leave to serve the notice was only granted on proof being produced that the Plaintiffs concurred in the application; and it is clear from the cases of *Swansea Shipping Company* v. *Duncan* (2) and *Bower* v. *Hartley* (3) that the application should be made upon notice. It would be monstrous if a defendant could bring in numerous third parties to the action, without the plaintiffs being heard upon the application. The balance of convenience is in favour of the plaintiffs being heard at the earliest stage of the proceedings: *Associated Home Company* v. *Whichcord* (4); *Daniell's* Chancery Practice Forms (5).

Romer, in reply.

HALL, V.C.:—

Though I can make the order asked for, I should prefer in this case that notice be given to the Plaintiffs. I may say, further, that I should be unwilling to give the leave asked for in any case without notice being given to the Plaintiffs of the granting of that which might interfere with their action in a very material way. Convenience is all in favour of hearing what the Plaintiffs have to say in the first instance, instead of waiting to have the difficulties raised and discussed on a subsequent application. My opinion is that notice should be given in every case.

Romer:—The second point in the summons is that the leave asked for to serve these third parties ought to be granted. What the Defendants claim is a simple right over against the shareholders, and to such right they are manifestly entitled. It is of the utmost importance to them that the shareholders should be precluded from hereafter saying that the judgment fixing these Defendants with liability is not binding on the shareholders, because it was improperly defended or compromised. The granting

(1) 1 Ch. D. 176.
(2) 1 Q. B. D. 644.
(3) 1 Q. B. D. 652.
(4) 8 Ch. D. 457.
(5) Page 169, Form 335.

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of the leave will not in any way embarrass or impede the Plaintiffs. In all probability the shareholders will not appear, and even if they do, the Court has ample jurisdiction to consolidate the proceedings, so that one of such shareholders shall represent the whole class.

[He referred to *In re National Funds Assurance Company* (1), *Swansea Shipping Company* v. *Duncan* (2), and *Wilson's* Judicature Acts and Rules (3).]

Whitehorne, for the Plaintiffs, was not heard.

HALL, V.C.:—

I think that this application is one which cannot be entertained, on the ground that it would be inconvenient to sanction a proceeding which would have the effect of embarrassing the Plaintiffs in proceeding with their action, and that to such an extent that the Court in its discretion exercised judicially could not allow. The Court has to say, looking at all the circumstances of the case, whether or not it is a proper one in which the collateral question or claim over should be introduced into the main action. It was said that if all these persons, some 450 in number, were made parties to the action, the Court would find means to consolidate the proceedings or limit them in some way to some particular persons as being representatives of the whole class. Whether the Court can make such an order I will not now say, but I may remark that I am not satisfied that the proceedings can be made to take a course which would not materially embarrass the Plaintiffs. For aught I know, there may be among these persons some who, though they have become shareholders, are not affected personally by what has taken place; others of them may be creditors of the company who are interested in the question of indemnity, and as to that various questions might arise. I am not satisfied that all this would not embarrass the Plaintiffs in the conduct of their action; and therefore it would not be right to make an order which would have the effect of bringing persons into the action, some of whom not improbably—indeed almost certainly—would have a

(1) 10 Ch. D. 118. (2) 1 Q. B. D. 644.
(3) App. B. Form No. 161.

case differing from that of the others. The number is very large, and there would be different defences raised, all of which would be highly inconvenient. Therefore I think that this is a case in which the Court, exercising its discretion, can properly and should say it will not hamper or embarrass the Plaintiffs in their action by having these other questions brought in for decision in the same litigation. I think that the Defendants must take the ordinary course of bringing independent actions, and that this summons must be dismissed, with costs of this hearing.

C. A.

The Defendants appealed against the decision of the Vice-Chancellor on the second point. The appeal was heard on the 15th of December.

Romer, for the Appellants, urged the same arguments as in the Court below.

Whitehorne, for the company, was not heard.

JESSEL, M.R.:—

The application under the 18th rule is no doubt an application to the judicial discretion of the Court, because it does not give the right to the defendant as a right, but only by leave of the Court or a Judge. Now, undoubtedly, that rule covers a case where the main question—as this appears to be—between the plaintiff and the defendant is also one of the questions between the defendant and the person whom he desires to serve with notice. But although it includes such a case, in my opinion it is not in every case, in which the question to be decided between the plaintiff and the defendant would also be a question to be decided between the defendant and somebody else, which entitles the defendant as a matter of course to leave to serve. There are several cases in which the Judge, as it appears to me, may well, in the exercise of his judicial discretion, think it right to give such a liberty.

It must not be forgotten that service of a notice of this kind puts a person who does not appear to a certain amount of cost

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and inconvenience. It is quite true that a person may choose to appear; whether by so doing he will or will not get his costs is a question on which I do not intend at present to offer any opinion, but if he does not appear, I certainly see no means by which he can get them. Therefore, it appears to me that if the Judge thought the claim to contribution, indemnity, or other remedy or relief *primâ facie* bad, he might, in the exercise of his discretion, decline to put the person served to that inconvenience. I only give that as an illustration, not saying that it applies to this case, which I intend to decide on different grounds. All these rules in favour of a defendant are subject to this observation, that they are not intended to embarrass the plaintiff in his action. They were intended to help the defendant as regards third parties, but were not intended to delay the plaintiff, or to subject him to further costs as a rule. If it appeared, as it does appear to me, that the giving the leave would unfairly hamper the plaintiff, then I think the leave should not be given.

Now the case, put shortly, with which we have to deal is this. A railway company sues its directors on the ground that they have paid a sum of money to contractors out of the funds of the company improperly, because the sum of money was paid to induce the contractor to pay over to the shareholders dividends upon their shares before the line was completed, contrary to the express provisions of the Act of Parliament. If that contention is made out, the directors, being guilty of a breach of trust, may be made liable jointly and severally to replace the moneys improperly paid. The suggestion or claim made on their behalf is that if that should turn out to be so they will be entitled to recover from the shareholders of the company, who, we are told, are 450 in number, all the moneys which these shareholders have received from the contractors as dividends with knowledge of the facts. Whether that is so or not I give no opinion beyond this, that I am by no means convinced that it follows as a necessary conclusion from the success of the Plaintiffs in the pending action. But even if it were so, the Defendants propose to serve some 450 people, every one of whom has a right, as I read it, to dispute the Plaintiffs' claim. The 20th rule says that if the third party

tries to dispute the plaintiff's claim as against the defendant he must enter an appearance in the action. According to that theory you might have—I do not say you would have—450 more defendants, and then when they came in under the 21st rule they would take out 450 summonses—or they might do so—to have the directions of the Judge as to the mode in which the action was to be tried, and then the Judge might give everybody who asked it liberty to defend the action. If that were carried out to its full extent, which I agree is not probable, and I might say not possible, you would have 450 defendants with 450 counsel, or it might be 900 counsel, entitled to appear at the trial with a tribe of witnesses brought by each one. Of course, I know this is putting the thing in a very absurd light: but let us substitute for 450 one-tenth of the number, which is not improbable, and you at once see the embarrassment and annoyance caused to the plaintiff, and the difficulty which would be thrown in the way of his successfully prosecuting the action. It does appear to me, looking at the nature of the case made, and looking to the circumstances to which I have adverted, that the discretion of the Court below was well exercised, and that this appeal should not be allowed.

COTTON, L.J.:—

I am of the same opinion. I think the case is one within the rule which has been relied upon—the 18th rule—but if it is within the rule, the Judge is to exercise a discretion when the application is made to him, and one of the rules which, in my opinion, he ought to have regard to in exercising his discretion is this, that the application is not to be allowed where it will hinder or embarrass the plaintiff in the prosecution of the action. In the present case, if the order were made, there would be a large number of persons who might claim to appear and support by evidence and otherwise the case on which they rely. The Court, if it had made the order which must necessarily be made in the absence of the parties to be served, had no power to give any directions as to their appearance and conduct in the action. I think, therefore, that the Plaintiff might have been seriously embarrassed if the order had been made, and that it was rightly refused.

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LUSH, L.J.:—

I am entirely of the same opinion. I think it is sufficient to base it upon the grounds on which the Vice-Chancellor decided, and which my learned colleagues have also taken; although there are, to my mind, very serious considerations indeed, beyond that upon which happily it does not become necessary for us to express any opinion at the present moment.

Now the Court is to be satisfied that there is a question in common between the plaintiff and the defendant, and the defendant and the persons sought to be brought in, which ought to be determined in the action. I confess I do not see that there is a question in common which ought, considering all the circumstances, to be determined between these parties. The benefit which the defendant would get from having this single question in common determined would be infinitessimally small compared with the embarrassment which the bringing in of this large number of persons would cause to the plaintiff, and it never was intended that the power of the Court should be exercised to bring in parties whose presence, with the rights which belong to them as such, would embarrass the plaintiff in the management of his claim against the defendant. Now, if these persons are brought in, it is impossible to deny to them the right, if they please, to be represented at the trial and to call their own witnesses. How can this be possibly done without putting the Plaintiff to an enormous inconvenience and embarrassment, and virtually rendering all the trial abortive?

I think I have said quite enough to base my opinion upon that ground, without referring to any other considerations that arise, and to say that this decision of the Vice-Chancellor should be affirmed.

Solicitors for Company: *Newman, Stretton, & Hilliard.*
Solicitors for Defendants: *Wilson, Bristows, & Carpmael.*

Ex parte BROWNE. *In re* MALTBY.

C. A. 1880 Dec. 16.

Receiver in Bankruptcy—Application for Payment of Remuneration—Complaint against Trustee—Locus Standi—"Person aggrieved"—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 20—*Bankruptcy Rules*, 1871, *rr.* 3, 7.

A receiver in bankruptcy or liquidation has no lien upon the assets for his remuneration; he is only entitled to be paid out of the net assets.

And he is not entitled to come to the Court to complain of the conduct of the trustee in the administration of the assets.

Such a complaint can be made only by the creditors.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

On the 2nd of April, 1879, *Henry Maltby*, a licensed victualler, who kept the *Bird-in-Hand* public-house at *Hampstead*, filed a liquidation petition, and on the 4th of April *W. L. Clifton Browne* was appointed receiver of the debtor's property, of which he took possession the same day. On the 10th of April, 1879, he was appointed manager of the debtor's business. On the 5th of June, 1879, the creditors resolved on a liquidation by arrangement, and appointed *Frederick Carr* trustee of the debtor's property, with a committee of inspection. On the 12th of June *Browne* gave up possession of the property and business to *Carr*. According to *Browne's* evidence the property of the debtor which he then handed over to *Carr* (consisting of stock-in-trade, furniture, fixtures, and book debts) was of the value of £961 16*s.* 9*d.*, and he afterwards paid over to *Carr* a cash balance of £124 19*s.* 6*d.* *Carr* said that the value of the stock-in-trade was about £130 less than the value put upon it by *Browne*. In November, 1879, *Browne's* charges as receiver and manager were taxed by the officer of the Court at £60 15*s.* His actual disbursements had been previously paid to him. *Browne* made various applications to *Carr* for payment of the £60 15*s.*, and ultimately in March, 1880, he applied to the Court for an order directing *Carr* to pay him the amount. He alleged that *Carr* had dealt improvidently with the assets, and had wasted them in carrying on the business at a loss.

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In answer to the application *Carr* deposed that the balance in his hands on account of the estate consisted of a sum of £122 0*s.* 3*d.*, and that he did not anticipate that anything further would come to his hands. He said that this balance was the only fund available for the payment of charges and expenses in connection with the realization of the estate, and that the claims against the balance were as follows:—

	£	*s.*	*d.*
Auctioneer's charges on the sale of the public-house and the furniture and effects therein	117	2	2
Solicitor's costs in relation to the sale of the public-house	84	6	3
Auctioneer's charges for an attempted sale	15	2	1
Charges for survey for dilapidations .	10	10	0
Receiver's taxed costs	60	15	0
Solicitor's costs of liquidation petition .	62	7	7

and some other charges, besides the charges of the trustee's own solicitors in connection with the liquidation, and his own remuneration. According to the trustee's account the moneys which he had received on account of the estate had been spent in carrying on the debtor's business, and in paying the rent of the premises and rates and taxes, and the mortgage debts on the premises.

The Registrar refused *Browne's* application with costs.

Browne appealed.

Winslow, Q.C., and *Wightman Wood*, for the Appellant:—

If the trustee has chosen to muddle away the estate, the receiver's rights ought not to be prejudiced. The trustee ought to have realized the assets, and not to have wasted them in carrying on the business at a loss.

[JAMES, L.J.:—Can we take an account of the estate on the application of the receiver? That is what you want us to do.]

The receiver has a first charge on the assets: *Ex parte Page* (1); *Ex parte Adams* (2). The material rules relating to receivers are rules 2, 3, and 7 of the Bankruptcy Rules, 1871 (3).

(1) 25 L. T. (N.S.) 716.

(2) 2 Mont. & A. 706.

(3) Rule 2: "Where a receiver or manager of the property or business of

When a receiver hands over assets which he has received to the trustee, he is not bound to wait for the payment of his remuneration until the rest of the estate has been ascertained and realized. The Court will protect its own officer. He is as much entitled to his remuneration as the auctioneer. We should have applied to the Court at an earlier stage to prevent the trustee from wasting the assets, but for the fact that he made frequent promises to pay the receiver. Even if the receiver can sue the trustee at law, still the Court of Bankruptcy has jurisdiction to interfere as between its own officers: *Ex parte Coates* (1). There must be some limit to the discretion of the trustee.

The receiver is a "person aggrieved" by the act of the trustee in wasting the assets which he handed over to him: *Bankruptcy Act*, 1869, s. 20.

[LUSH, L.J.:—If all the creditors had agreed that the estate should be administered in a particular way, could the receiver come to the Court and ask it to overrule the decision of the creditors?]

The Court would have jurisdiction to do so, but it would have a discretion.

Robinson, Q.C., and *D. L. Alexander*, for the trustee, were not heard.

JAMES, L.J.:—

It appears to me that we ought not to disturb the order of the Registrar. The receiver is entitled to be paid his charges out of

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a bankrupt shall have been appointed, he shall, upon the appointment of a trustee, deliver to such trustee all money and property which may have come to his hands, unless the Court shall otherwise order."

Rule 3: "A receiver or manager, in cases either of bankruptcy or liquidation, shall not have any lien whatever for his remuneration on any money or property which may have come into his hands."

Rule 7: "Where the receiver or manager is not continued as trustee, or is continued as trustee but without remuneration, he shall be allowed out of the estate such sum for his services as receiver or manager as the taxing officer of the Court shall, having regard to the views of the trustee and committee of inspection (if any) thereon, think fit."

(1) 1 Mont. & A. 328.

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the estate of the bankrupt, and according to the accounts of the trustee there is no estate. The receiver claims now to question the propriety of the conduct of the trustee in the administration of the estate, and it is said that he could have applied to the Court to direct the trustee how he should administer the estate. It appears to me that it would be a monstrous evil if the receiver could come to the Court to question the management of the estate by the trustee or the creditors. If the receiver suffers from any mismanagement of the estate, he suffers in common with the trustee himself, the solicitor, and the creditors. If there is any ground of complaint against the trustee it is safer to allow the complaint to be made by the creditors, who are the persons who will really suffer. It is not desirable to allow the receiver to come here as a litigant party to question the propriety of the trustee's management of the estate.

COTTON, L.J.:—

I am of the same opinion. We should be placing receivers in a different position from that in which they really stand, if we were to allow such an application to be made. A receiver has no charge upon the assets for his remuneration; his right is only to be paid out of the net proceeds of the estate. And, in order to ascertain what those proceeds are, the estate must first be administered for the benefit, not of the receiver, but of the creditors. If the trustee has acted improperly in the administration, I am of opinion that the receiver is not the person to question what he has done; the creditors are the proper persons to do that. It would not be right to allow the receiver, who has no lien upon the assets, to come here and question the conduct of the trustee in the administration, when the creditors do not complain of it.

LUSH, L.J.:—

I am of the same opinion. I think we should be making a very mischievous precedent if we held that the receiver could come to the Court to question the conduct of the trustee, who is under the control of the creditors. If the trustee has dealt injudiciously with the assets, and has caused a loss to the estate, he can be called to account by the creditors; it is not for the receiver to

question what he has done. The receiver's remuneration is to be paid out of the assets, *i.e.*, out of the net assets. If he says that there ought to be assets, that is a matter for the creditors to complain of. The receiver cannot apply to the Court for payment unless he shews that there are net assets.

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Solicitors for Receiver: *Nash & Field.*
Solicitors for Trustee: *Champion, Robinson, & Poole.*

Ex parte HALL. *In re* ALVEN.

C. A. 1880 C. J. B. *June* 14. C. A. 1881 *Jan.* 27.

Practice—Appeal in Bankruptcy—Time for Appealing from County Court to Chief Judge—Bankruptcy Rules, 1870, *r.* 143—*Bankruptcy Rule of 26th May*, 1873—*Rules of Court*, 1875, *Order* LVIII., *rr.* 9, 15.

Notwithstanding the rules under the Judicature Acts, the time for appealing to the Chief Judge from an order made in a bankruptcy matter by a County Court is still regulated by the Bankruptcy Rules.

And, in reckoning the twenty-one days allowed by rule 143 of the Bankruptcy Rules, 1870, for appealing, Sundays are, by virtue of the Rule in Bankruptcy of the 26th of May, 1873, not to be taken into account.

ON the 6th of May, 1880, an order was made in the *Exeter* County Court annulling an adjudication of bankruptcy which had been made in May, 1869, against *S. W. Alven*. The bankrupt died in May, 1870. On the 31st of May, 1880 (a Monday), his personal representative entered an appeal to the Chief Judge from the order of annulment. The appeal was in the paper for hearing on the 14th of June, 1880.

Winslow, Q.C., and *De Castro*, for the Appellant.

Roxburgh, Q.C., and *Townsend*, for creditors:—

The appeal is too late, as it was not entered until after the expiration of twenty-one days from the day on which the order was pronounced: *Ex parte Whitton* (1); *Ex parte Viney* (2); Rules of Court, 1875, Order LVIII., rr. 9, 15.

(1) 13 Ch. D. 881. (2) 4 Ch. D. 794.

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Ex parte HALL. *In re* ALVEN.

Winslow, Q.C., and *De Castro*, for the Appellant, the personal representative :—

Ex parte Viney (1) was an appeal from the Chief Judge to the Court of Appeal, and it was held that the Bankruptcy Rules had been expressly varied by the Judicature Rules as to the time for appealing to the Court of Appeal. But that decision does not apply to appeals from the County Court to the Chief Judge. The time for entering such appeals is still regulated by the Bankruptcy Rules, and Sundays are not to be reckoned in computing the twenty one days allowed by rule 143 of the Bankruptcy Rules, 1870, for appealing: Bankruptcy Rule of 26th May, 1873 (2).

The Sundays being excluded, our appeal was entered in time.

BACON, C.J. :—

I have nothing to do with the rules under the *Judicature Act*, which do not affect the practice of the Court of Bankruptcy. The appeal is not out of time.

The appeal was then heard on its merits and was allowed. The opposing creditors appealed from the decision of the Chief Judge. The appeal was heard on the 27th of January, 1881.

Townsend (*Roxburgh*, Q.C., with him), for the Appellants, repeated the arguments which had been adduced to the Chief Judge, and referred to *Ex parte Garrard* (3); *Ex parte Viney*;

(1) 4 Ch. D. 794.

(2) Rule 143 : "An appeal against a decision or order of the Chief Judge in Bankruptcy, or a Judge of a County Court, shall be entered with the Registrar of Appeals within and not later than twenty-one days from the said decision or order, by leaving with him a copy of the appeal notice of motion."

The rule of the 26th of May, 1873, rescinded rule 150 of 1870, and provided that "The office for entering bankruptcy appeals shall be open daily throughout the year, from ten till four o'clock, except on Sunday, Christmas Day, Good Friday, the Saturday after Good Friday, Monday and Tuesday in Easter week, or any day appointed for a public fast or thanksgiving, and except also on Saturdays, when the office may be closed at two o'clock; and the days on which the office shall be wholly closed shall not be reckoned in the number of days ordered for the entering of appeals."—*Vide* 17 Solicitors' Journal, 715.

(3) 5 Ch. D. 61.

Rules of Court, 1875, Order LVIII., rr. 9, 15; Bankruptcy Rules, 1870, r. 143; Bankruptcy Rule of 26th May, 1873.

C. A. 1881 *Ex parte* HALL. *In re* ALVEN.

Winslow, Q.C., and *De Castro*, for the personal representative, were stopped by the Court.

JAMES, L.J. :—

It appears to me that the rules under the *Judicature Act* do not apply to appeals from the County Court to the Chief Judge. And by the Bankruptcy Rules Sundays are expressly excluded from the computation of the twenty-one days.

BRETT, L.J., concurred.

COTTON, L.J :—

We have already held that the rules under the *Judicature Act* apply to appeals from the Chief Judge to this Court. They do not, however, apply to appeals from the County Court to the Chief Judge; as to those appeals the Bankruptcy Rules still remain in force.

Solicitor for Appellants: *G. Presswell.*
Solicitors for Respondents: *Clarkes, Rawlins, & Clarke.*

In re NASH.

C. A. 1881 *Jan.* 15, 29.

Practice—Lunatic Trustee—Vesting Order—Trustee Act, 1850 (13 & 14 *Vict.* c. 60), *s.* 5.

When one of several trustees of stock becomes lunatic or of unsound mind, the Court, although it may have jurisdiction under sect. 5 of the *Trustee Act*, 1850, to make an order vesting the right to transfer the stock solely in the co-trustees, will not do so, but a new trustee in the place of the lunatic must be appointed before a vesting order will be made.

19 Ch D 386

THIS was a petition by the beneficiaries and two of the three trustees under the will of *Thomas Bond*, deceased, asking that the right to transfer a sum of £28,500 Consols and to receive the dividends thereof might vest in the petitioning trustees.

Not followed Re Watson 19 Ch D 384.

C. A. 1881 *In re* NASH.

The Consols were standing in the names of one *Nash* and the petitioning trustees as the three trustees of such will, and *Nash* had lately become lunatic, though not so found by inquisition.

Horton Smith, Q.C., and *Arkcoll*, for the Petitioners, submitted that the Court had jurisdiction to make the order asked for under s. 5 of the *Trustee Act*, 1850, which enacts that "when any person or persons shall be entitled jointly with any lunatic or person of unsound mind to any stock . . . upon any trust . . . it shall be lawful for the Lord Chancellor to make an order vesting the right to transfer such stock or to receive the dividends thereof . . . either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any other person or persons the said Lord Chancellor may appoint."

COTTON, L.J.:—

It is not usual to make such a vesting order as that now asked for, although the Court may have jurisdiction to make it under the section that has been referred to, without first requiring a new trustee to be appointed in the place of the lunatic. In my opinion the Court ought not, by vesting the trust property in two only of three trustees, attempt to do indirectly what it has no power under that Act to do directly, that is, to remove a trustee without appointing another in his place. The petition must stand over and be amended by asking for the appointment of a new trustee in the place of the lunatic.

Jan. 29. The petition having been amended as directed,

COTTON, L.J., made the usual order appointing a new trustee, and vesting the right to transfer the Consols, &c., in the new trustee jointly with the two petitioning trustees.

Solicitors: *Arkcoll & Cockell.*

Ex parte ALLARD. *In re* SIMONS.

C. A.
1881
Feb. 3.

Liquidation by Arrangement—Subsequent Agreement to accept Composition—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 28—*Debtor left in Possession of Assets—Default in Payment of Composition—Rights of Trustee—Assignment of Book Debts by Debtor—Surety for Payment of Composition—Counter-Indemnity by Debtor.*

Two partners in trade filed a liquidation petition, under which a trustee of their property was appointed. Afterwards the creditors, under the provisions of sect. 28 of the *Bankruptcy Act*, 1867, passed resolutions authorizing the trustee to accept a composition from the debtors, and the arrangement was approved by the Court. The composition was to be paid in four instalments, part of the last of which was to be secured by a surety. One of the debtors, who was about to carry on the business alone, agreed to pay £30 to the trustee weekly, until he should have paid the amount of the composition. In case of his making default, the trustee was to be at liberty to take possession of his stock-in-trade, assets, and effects, and realize them for the benefit of the creditors of the firm. The discharge of the debtors was to be granted, the liquidation closed, and the trustee released, so soon as the trustee should certify to the Court that a sum sufficient to pay the composition had been paid to him by the debtor. The first instalment was duly paid, but the debtor afterwards made default, and the trustee took possession of his stock-in-trade and effects. It then appeared that the debtors had, shortly before the seizure, executed a deed assigning the outstanding book debts of the firm to the surety and another person, as security for moneys advanced by them, and also as a security to the surety against his liability in respect of the last instalment of the composition. The advances had been made since the passing of the resolutions, to enable the debtor to carry on the business and to pay the first instalment of the composition:—

Held, that the resolutions of the creditors gave an implied authority to the debtor to carry on the business in the ordinary way, and to pledge the assets in order to raise money for the purposes of the business, or for the purpose of paying the composition, and that the assignees were entitled to the book debts as a security for the advances which they had made.

But, *held*, that the resolutions did not authorize the pledging of the assets as an indemnity to the surety against his liability in respect of the last instalment of the composition, and that the deed could not stand as a security in that respect.

Ex parte Burrell (1) distinguished.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 15th of January, 1880, *Caroline Simons* and *Victor*

(1) 1 Ch. D. 537.

C. A. 1881 *Ex parte* ALLARD. *In re* SIMONS.

Simons filed a liquidation petition. They had carried on business in partnership as tailors and outfitters. *Caroline Simons* had also carried on a separate business as a milliner, and *Victor Simons* had carried on a separate business as a photographer. On the 14th of February the executors resolved on a liquidation by arrangement and appointed *J. F. Lovering* trustee. On the 16th of March, 1880, a meeting of the creditors was held, which had been convened by the trustee under sect. 28 of the *Bankruptcy Act*, 1869, for the purpose of considering a general scheme for the settlement of their affairs which had been proposed by the debtors. The scheme was assented to by the necessary majority of the creditors, and was on the 11th of May, 1880, approved by the Court.

The resolutions passed at the meeting of the creditors were as follows:—

"1. That the trustee be authorized to accept an offer made to him on behalf of the debtors to pay to each of their creditors a composition of seven shillings in the pound on the amount of their respective debts (whether the same be due from the firm of *C. Simons & Son* or from *Caroline Simons*), such composition to be payable by four weekly instalments of 1*s.* 9*d.* in the pound each, payable in three, six, nine, and twelve months respectively, from the 23rd of February, 1880, the whole of such instalments to be secured by the promissory notes of the debtors, and the sum of £150, part of the fourth instalment, to be secured by the promissory notes of Mr. *Alfred G. Allard;* the said *Victor Simons* having agreed to pay all costs, charges, remuneration, and expenses of solicitors and accounts already incurred or to be incurred, in accordance with the terms of a memorandum of agreement dated the 5th of March, 1880, and made between *Victor Simons* of the one part and the trustee of the second part, and the debtors also undertaking to provide the trustee with funds to satisfy any claim for rent and any other preferential payments. With a view to further secure the due payment of the composition, *Victor Simons* further agrees to pay to the trustee the sum of £30 weekly, from the 23rd of February, 1880, until he shall have paid to him a sum sufficient to pay the amount of the composition, and all costs, charges, remuneration, expenses, and preferential claims.

"2. That in the event of *Victor Simons* neglecting, omitting, or failing to make such weekly payments, or any one of them, for the period of ten days after the same should be due and payable, then the trustee shall be at liberty to enter upon and take possession of the stock-in-trade, assets, and effects of *Victor Simons*, whether the same should be at either of the places of business or at any other place whatsoever, and to possess and realize the same for the benefit of the present creditors of the debtors.

"3. That the discharge of the debtors and each of them be and the same is hereby granted so soon as the trustee shall certify to the Court in writing that *Victor Simons* has, by such weekly payments as aforesaid or otherwise, paid to him a sum sufficient to pay the composition of 7*s.* in the pound, and the several payments provided for by the agreement, and all preferential payments.

"4. That the liquidation be closed on and from the date of the said certificate.

"5. That the trustee be released on and from the same date."

Victor Simons proceeded to carry on the business alone, and in accordance with the provisions of the scheme he from time to time made payments to the trustee on account of the instalments of the composition, and on the 23rd of May, 1880, the trustee paid the creditors the first instalment of the composition. After that date the payments made by *Victor Simons* to the trustee became irregular, and on the 9th of August, he having failed to keep up the weekly payments, the trustee took possession of his stock-in-trade and effects, with the intention of selling them, and also of collecting the outstanding book debts due to the debtors, and of distributing the proceeds among the creditors. *V. Simons* objected to the trustee's removing the books which contained entries of the book debts, on the ground that he and *Caroline Simons* had made an assignment of their book debts to *A. G. Allard* and *Fanny Nordon*.

The assignment was made by a deed dated the 3rd of August, 1880, which contained recitals of the liquidation proceedings, and of the provisions of the scheme assented to at the meeting of the 16th of March. There were also recitals that *Allard* had at various times since the filing of the petition advanced to the debtors sums amounting to £70, and had also in pursuance of the

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scheme given his promissory note for £150 payable in twelve months from the 23rd of February, 1880; that Mrs. *Nordon* had also since the filing of the petition from time to time advanced to the debtors sums amounting to £75; that the debtors had applied the moneys so advanced to them partly in carrying on the business of tailors and outfitters, partly in providing for the due payment of the instalment of the composition payable on the 23rd of May, 1880, and partly in providing for the weeky payments payable by *V. Simons* under the scheme; and that the debtors were desirous of securing to *Allard* and Mrs. *Nordon* the repayment of the moneys thus advanced by them, and also of securing to *Allard* the repayment of the £150 which he would be liable to pay on his promissory note. And it was witnessed that in consideration of the premises *Caroline Simons* and *Victor Simons*, and each of them, did assign to *Allard* and Mrs. *Nordon* all the book and other debts then due and owing to her, him, and them on account of the business of outfitters as aforesaid, and all securities for the same, and also all contracts and engagements, benefits and advantages, which had been entered into with *Caroline Simons* and *Victor Simons*, or either of them, on account or in respect of the said debts, to hold, receive, and take the same to *Allard* and Mrs. *Nordon*, their executors, administrators, and assigns, absolutely.

On the 27th of August, 1880, the trustee applied to the Court for an order declaring the deed of assignment void as against him.

Allard made an affidavit, in which he said that he had lent the sum of £70 mentioned in the deed to *V. Simons* to enable him to carry on his business, and that £30 of it went towards payment of the first instalment of the composition. He also said that it was within his knowledge that Mrs. *Nordon* had advanced to *V. Simons* the £75 mentioned in the deed, for the purpose of enabling him to carry on his business, and he said that both these advances had been made since the 16th of March, 1880, and that he had given the promissory note for £150.

The Registrar declared the deed void as against the trustee, and ordered *Allard* and Mrs. *Nordon* to pay over to the trustee all moneys and debts collected or received by them, or either of them, under the assignment.

Allard and Mrs. *Nordon* appealed.

F. Cooper Willis, for the Appellants:—

After the resolutions of the creditors had been approved by the Court the debtors were entitled to realize their estate, or part of it, for the purpose of carrying on the business and paying the composition. And the assignees of the book debts are entitled to hold them as security for what they have paid to the debtors. If the debtors had made clothes for their customers out of the cloth which formed part of their estate, could the trustee, if the debtors failed to pay the composition, claim the clothes as well as the money which had been paid for them? The trustee might be entitled to seize anything which remained in the debtors' possession; he cannot seize anything which they have disposed of.

Winslow, Q.C., and *Herbert Reed*, for the trustee:—

The trustee has not assigned the book debts to the debtors; no one but the trustee could sue for them. The trustee is in the position of an unpaid vendor, and no one can take the assets from him except on payment of the agreed price.

[COTTON, L.J.:—Is there not an implied authority to the debtors to deal with the assets in some way? It may be that they can only deal with them in the ordinary way of business.]

It is, at any rate, only an authority to carry on the business in the ordinary way. The liquidation is not at end until the composition is paid; until then the assets all remain the property of the trustee.

[JAMES, L.J.:—If that were so great injustice might be done. The old creditors allow the debtor to go on trading and to contract new debts. Can they afterwards come and take away all the assets?]

New trade creditors might have a right under the doctrine of *Troughton* v. *Gitley* (1).

[JAMES, L.J.:—We have always, in such cases, recognised the rights of the new creditors.

(1) Amb. 630.

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Willis referred to *Ex parte Ford* (1).]

The resolutions provide that the liquidation is to continue until the composition is fully paid. There is a great difference between liquidation and composition: *Ex parte Charlton* (2). The surety for the last instalment of the composition cannot acquire a security in this way against his liabibity to the creditors. And indeed any one who takes such an assignment as this out of the ordinary course of trade, with knowledge, as he must have from the recitals in the deed, of all the facts, can have no right as against the trustee. The object of the scheme of arrangement was to secure that the creditors should get the composition paid to them; there is nothing in it to take the property in the book debts out of the trustee until the debtors get their discharge; the discharge is expressly withheld until the whole of the composition shall have been paid. In *Meggy* v. *Imperial Discount Company* (3) Lord Justice *Bramwell* said (4): "It has been argued that the plaintiff is deprived of his right to the furniture because he has stood by and has allowed the insolvent to deal with it as his own: is it to be laid down that if goods are left in the hands of an execution debtor, the execution creditor is to enjoy a priority as to them over the real owner? Is an upholsterer to lose his property because he has hired out furniture to an insolvent customer?" The principle of those observations applies to the present case.

[JAMES, L.J.:—What title has the trustee to have the deed declared void?]

It is an assignment by one person of the property of another to an assignee who had notice of the real title.

[JAMES, L.J.:—Why is not the deed good as between the parties to it? If you have a better legal right than the assignees, you can sue them.]

The order only declares the assignment void. The Appellants knew the conditions imposed by the creditors' resolutions, and they ought to have inquired whether they had been fulfilled by the debtors. They can only take subject to the right of the trustee. If the assignment had comprised everything that the

(1) 1 Ch. D. 521.
(2) 6 Ch. D. 45.
(3) 3 Q. B. D. 711.
(4) Ibid. 716.

debtors had, and the purchase-money had been paid to them and they had gone away with it, would the trustee have had no claim against the assets?

[BRETT, L.J.:—What obligation was there on the assignees to ask any questions?]

If they do not ask they are bound by the conditions. The resolutions contain no license to the debtors to carry on their trade: *National Mercantile Bank* v. *Hampson* (1); *Taylor* v. *M'Keand* (2); *Walker* v. *Clay* (3); *Cochrane* v. *Rymill* (4).

JAMES, L.J.:—

It appears to me that we must decide this case upon a consideration of what was the real and true bargain between the parties at the time when the arrangement for a composition was made. What was it they meant to do, and did do, in substance and intention? It appears to me that what they intended was this, that in consideration of the composition the business was to be carried on by the son alone (not by the mother) in the usual way in which such a business is carried on, and that in carrying it on he was to exercise such a control over the assets as would enable him to raise money for the purpose of paying the composition. It would be utterly inconsistent with this intention that the debtors should have no power to deal with the trade debts which were then outstanding. An implied authority was given to deal with them to that extent. All that it is necessary for us to say is that the implied authority given to the debtors goes to the extent of authorizing any dealing with the assets in the ordinary course of business, or for the purpose of raising money to carry on the business or to pay the composition. And it appears to me that this security was given *bonâ fide* in order to raise money, partly for the purpose of carrying on the business, and partly for the purpose of paying the composition, those purposes being within the implied authority given by the creditors. I am of opinion, therefore, that the order of the Registrar must be discharged.

BRETT and COTTON, L.JJ., concurred.

(1) 5 Q. B. D. 177.
(2) 5 C. P. D. 358.
(3) 49 L. J. (C. L.) 560.
(4) 27 W. R. 776.

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JAMES, L.J.:—The Appellants are entitled to the benefit of the assignment as a security for the moneys which they have advanced.

F. Cooper Willis:—I submit that the Appellant *Allard* is also entitled to treat the deed as a security against his liability in respect of the fourth instalment of the composition: *Ex parte Burrell* (1).

[JAMES, L.J.:—In that case the debtor's property had not vested in a trustee.]

The principle of the decision applies; there was a private arrangement between the debtor and a person who had agreed to guarantee an instalment of a composition, for the indemnity of the surety by means of a deposit with him of goods of the debtor, and the arrangement was held to be good against the trustee in the debtor's liquidation.

[COTTON, L.J.:—That was the case of an ordinary composition, and the title of the trustee arose under a subsequent liquidation petition.]

Winslow, Q.C., and *Herbert Reed*, for the debtor, were not heard on this point.

JAMES, L.J.:—

Ex parte Burrell does not apply. The giving security for the liability of the surety to pay the £150 is not such a dealing with the assets as was authorized by the resolutions. The deed is a valid security for the two sums which have been already advanced, but not for anything more.

BRETT and COTTON, L.JJ., concurred.

JAMES, L.J.:—The Appellants are entitled to their costs, for the trustee claimed to set the deed aside altogether.

Solicitor for Appellants: *H. W. Christmas.*
Solicitors for Trustee: *Phelps, Sidgwick, & Biddle.*

(1) 1 Ch. D. 537.

Ex parte BUCKLEY. *In re* BUCKLEY.

C. A. 1881 Feb. 3.

Liquidation Petition—Debtor's Statement of Affairs—Distinction between Joint and Separate Debts and Assets—Debtor formerly in Partnership—Registration of Resolutions—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 125—*Bankruptcy Rules*, 1870, *rr.* 287, 295.

A debtor, who in his liquidation petition describes himself as having been formerly in partnership, ought in his statement of affairs to distinguish between his joint and separate debts and assets, or to state expressly that no debts and no assets of the former partnership exist.

If the statement of affairs fails to do this, resolutions passed by the creditors under the petition ought not to be registered.

The statement of affairs ought not to be supplemented by affidavits filed after the meeting of the creditors.

THIS was an appeal from the refusal of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy, to register resolutions accepting a composition which had been passed by the creditors of *Robert Orford Buckley*.

In his petition for liquidation or composition *Buckley* had described himself as "carrying on business at No. 4, *Market Buildings*, *Mincing Lane*, in the city of *London*, as a produce broker, and formerly carrying on business in copartnership with *William Sheldrick* and *Herbert Pugh*, as produce brokers, under the style of *Buckley*, *Sheldrick*, & *Pugh*, at 27, *Fenchurch Street*, in the said city of *London*, and subsequently in copartnership with the said *William Sheldrick* alone, carrying on the like business at the same place and afterwards at 29, *Mincing Lane* aforesaid, under the style of *Buckley*, *Sheldrick*, & *Co.*, and residing at 14, *Westbourne Square*, in the county of *Middlesex*."

In the statement of his affairs produced by the debtor at the meetings of his creditors he did not distinguish between his separate and joint debts or between his separate and joint assets, and on that ground the Registrar refused to allow the registration of the resolutions, which was opposed by a creditor named *R. H. Williams*, for that reason among others.

Upon the hearing before the Registrar the debtor made affidavits, in which he stated that there was no outstanding joint estate of either of his former firms, and that he was not possessed of any

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estate or property whatsoever jointly with any other person or persons, but that his sole property consisted of the separate assets mentioned in his statement of affairs. He also said that he had, since the 31st of December, 1873, carried on business alone, and for the last six years at his present offices, 4, *Market Buildings;* that there were no joint debts owing by him and *Sheldrick* and *Pugh*, the firm of *Buckley, Sheldrick, & Pugh* having been dissolved on the 14th of December, 1871, and all debts of that firm having been paid; that there were no joint debts owing by himself and *Sheldrick* in respect of the firm of *Buckley, Sheldrick, & Co.*, that firm having been dissolved at the end of the year 1873, and all its debts then paid, except the claims of six creditors whose names he mentioned; but he said that those debts were, as joint debts, released by the six creditors respectively by a deed of arrangement of the 31st of December, 1873. And the debtor's solicitor deposed that he attended the meetings of the creditors, and that the resolutions were passed after full information of the state of the debtor's affairs. This evidence was uncontradicted.

The deed of the 31st of December, 1873, was made between *Buckley* of the first part, *Sheldrick* of the second part, and the six creditors referred to of the third part, and by it the six creditors released *Buckley* and *Sheldrick*, and their respective executors and administrators, from all debts, claims, and demands whatsoever in respect of the several sums of money set forth in a schedule to the deed, which were stated to be the sums in which the firm was indebted to the six creditors respectively. The consideration for the release was a separate covenant by *Buckley* with the six creditors to pay them respectively 3*s.* 4*d.* in the pound on the amount of their respective debts in three instalments, respectively on the 31st of December, 1875, the 31st of December, 1876, and the 31st of December, 1877, and a similar separate covenant by *Sheldrick* to pay the creditors 1*s.* 8*d.* in the pound in three instalments at the same dates. The amounts which remained due to the six creditors under *Buckley's* covenant were mentioned in the list of his debts contained in his statement of affairs.

The debtor appealed from the Registrar's decision.

Winslow, Q.C., and *Yate Lee*, for the Appellant:—

Rule 287 of the Bankruptcy Rules, 1870, contains no provision

that the statement of affairs must distinguish between joint and separate debts and assets. But the Registrar thought he was bound by the decision of the Chief Judge in *Ex parte Cockayne* (1). But the principle of that decision does not apply to the present case, for the debtor is not now in partnership, and the uncontradicted evidence before the Registrar shews that all the joint debts of his former partnerships have been either paid or converted into separate debts. All that he could do would be to add to his statement of affairs another page stating that the debts of his former firms were *nil* and the assets *nil*.

[JAMES, L.J. :—The statement in the petition that the debtor was "formerly" in partnership is consistent with the partnership having been dissolved only a month ago.]

The creditors had the opportunity of examining the debtor at the meeting, and his answers to questions then put to him would be taken as part of his statement of affairs: *Ex parte Aaronson* (2). The composition resolutions are not binding on any creditor who is not mentioned in the statement: sect. 126. A man is not bound to state in his petition that he has been formerly in partnership, if there are no debts of the partnership remaining unpaid.

[BRETT, L.J. :—But if he does, and it is consistent with his statement that the partnership terminated only a month ago, ought he not on the face of his statement to negative the existence of partnership debts?]

This rule is a mere rule of practice, not a statutory rule.

No one appeared in opposition to the appeal.

JAMES, L.J. :—

It appears to me that the Registrar has adopted the only safe course. The debtor was quite right in putting on the face of his petition a reference to his former partnerships, at any rate to that one in respect of which he had given the separate covenant, in order that his creditors might know that he was the same person who had formerly, as a partner, carried on business at a different address. The question is whether on the face of his statement of

(1) Law Rep. 16 Eq. 218. (2) 7 Ch. D. 713.

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affairs there is a presumption that he may be liable for joint debts, and whether he ought not to have distinguished between his joint and separate debts and assets. It may be that he could only have stated that his joint debts were *nil* and his joint assets *nil*, but the Registrar thought that if this was the fact, it ought to have appeared on the face of the statement of affairs. I think the Registrar was quite right in so holding, and that the statement of affairs ought not to be supplemented by affidavits filed after the meeting of the creditors. The facts ought to appear accurately on the face of the proceedings themselves. The Registrar has taken the only safe course. In *Ex parte Aaronson* (1) there was really only an explanation of the statement of affairs given by the debtor at the meeting.

BRETT, L.J.:—

I am of the same opinion on all the points.

COTTON, L.J.:—

I am of the same opinion. From the description which the debtor has given of himself, a presumption arises that he may have joint debts and joint assets, and there ought to be something on the face of the statement of affairs to point out which debts and which assets are joint and which separate. The question is whether there is sufficient on the face of the proceedings. In a liquidation by arrangement the Registrar could certainly not go beyond the statement of affairs. Whether the same rule applies strictly to a composition, I give no opinion. But I am of opinion that in all cases it is desirable that the same statement should be made, and that everything should appear on the face of the proceedings. The proceedings ought to be regular in form.

Winslow asked for leave to summon a fresh first meeting of the creditors.

THEIR LORDSHIPS gave leave.

Solicitors for Appellants: *Trinders & Curtis Hayward.*

(1) 7 Ch. D. 713.

BROWN *v.* SEWELL.

[1878 B. 493.]

C. A.
1880
V.-C. B.
Nov. 27.
C. A.
Dec. 15.

Practice — Taxation — Costs of Production and Inspection of Documents — Counsel's Fees and Refreshers.

When an order is made in an action in the Chancery Division for the production of documents at the office of the producing party's solicitor, that party, if ultimately successful in the action, is not entitled, as between party and party, to his solicitor's costs of the production, nor to his own costs of inspecting the documents of the other party.

When the trial of an action commences on one day and is concluded on the next day, refreshers to counsel will not be allowed unless the trial occupied in the whole more than one day's sittings, *i.e.*, six hours.

The Taxing Master's decision as to the amount of counsel's fees will not be interfered with unless a gross mistake is made.

THIS was an appeal from the decision of Vice-Chancellor *Bacon*.

The trial of the action commenced about 12 o'clock on one day and was concluded about 11 o'clock on the following day. There was an appeal, and ultimately the action was dismissed with costs. Mr. *Swanston*, Q.C., was leading counsel for the Defendant at the trial of the action, but died pending the appeal, and another Queen's Counsel was retained by the Defendant to appear upon the appeal.

On taxation of the costs of the action the Plaintiff raised three objections, viz.:—

1. That the costs of production of documents at the office of the Defendant's solicitor, and the costs of inspection of documents at the office of the Plaintiff's solicitor had been allowed.

2. That refreshers had been allowed to counsel in respect of the second day of the trial.

3. That a larger fee had been allowed to the Queen's Counsel who appeared for the Defendant on the appeal, than the fee allowed upon the original hearing, with a corresponding increase in the fee of the junior counsel.

The Taxing Master overruled all three objections, and Vice-Chancellor *Bacon* refused to interfere with his decision.

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The Plaintiff appealed. The appeal came on to be heard on the 15th of December, 1880.

Method, for the Appellants :—

[He was stopped on the first two points.]

As to the third point: there was no ground for increasing the fees of the leading counsel on the appeal. The brief was in bulk the same as that originally delivered, and the leader had no additional matter to work up. At any rate the mere change of the leading counsel is no ground for increasing the fee to the junior counsel.

Bond Coxe, for the Respondent :—

Fees and refreshers to counsel are matters purely within the discretion of the Taxing Master, and the Court will not interfere with his decision on questions of amount: *Harrison* v. *Wearing* (1); *Batley* v. *Kynock* (2); *Turnbull* v. *Janson* (3). As to the first objection: the Vice-Chancellor thought that it also was a matter clearly within the discretion of the Taxing Master, and therefore overruled it.

JESSEL, M.R. :—

The first point to be considered is whether, in a Chancery action, that is, in an action in the Chancery Division, when an order is made for the production of documents at the office of the producing party's solicitor, that party, if ultimately successful in the action, is entitled, as between party and party, to his solicitor's costs of production, and whether under the same circumstances the successful party is entitled to his own costs of inspecting the documents of his adversary. Under the old practice in the Court of Chancery the strict rule was that the inspecting party was entitled to have the documents ordered to be produced deposited at the Record and Writ Clerk's Office, and it afterwards grew to be the practice, as a matter of indulgence and convenience to the producing party, to allow the documents to be produced at the office of his own solicitors. There would have been no costs of produc-

(1) 11 Ch. D. 206. (2) Law Rep. 20 Eq. 632.
(3) 3 C. P. D. 263.

tion allowed at the Record and Writ Clerk's Office, and it was well settled in the Court of Chancery that the producing party could not make his opponent pay more costs, because, for his own convenience, he waived his strict right to have the documents deposited. I see no reason for altering this rule now. It appears to me, therefore, that these costs should not be allowed.

I should like to say a few words as to the practice at Common Law. Before the transfer of the Record and Writ Clerk's Office to the central office of the Royal Courts there was no office of the Common Law Masters at which documents could be deposited for inspection, so that, after the power to order production was conferred upon the Common Law Courts, it could only be exercised by ordering production at the office of the producing party's solicitor. It might well be said then that the production at the solicitor's office being a matter of right, not of favour, the costs of production might be allowed; and it appears from a note which Master *Dodgson* has just sent in to us at the request of Lord Justice *Lush* that that has been the practice at Common Law. I may mention that under the Judicature Acts there is power to order production in the country, and under the Common Law Orders to order production at the town agents'. These are matters to shew that this point has been overlooked, and some new rule may be required in order to make the practice uniform in all the Divisions. It is deserving of consideration, therefore, whether, for the future, production should not be at the district registry or at the central office, but I do not intend to decide that now.

As to the inspecting party's costs of inspection, the practice in Chancery is quite settled that he cannot get them from his adversary.

Then as to the refreshers to counsel. The practice at Common Law, as I stated in *Harrison* v. *Wearing* (1), was settled many years ago by the Court of Queen's Bench and the Court of Common Pleas—for I cousulted the Taxing Masters before giving my decision in that case, and they certified that it was so—that when a case occupied more than one day, which meant more than the time of one day, for it might occupy parts of two days, making less than one whole day, then the Taxing Master had a discretion

(1) 11 Ch. D. 206.

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to allow refreshers. But when the case occupied less than the time of one day, the Taxing Master could not allow refreshers; he had no discretion. In the present case the Taxing Master acted under a mistake as to the facts. He thought that the case had occupied more time than one whole day, and I think therefore that the appeal on this point also should be allowed.

As to the third point, the facts are exceptional, and somewhat singular. The Taxing Master, taking the circumstances into consideration, has allowed a larger fee to the Queen's Counsel on the appeal than was paid to his predecessor on the trial, and the fee paid to the junior was proportionately increased. No doubt in the Chancery Division the fees of counsel on an appeal are generally the same as on the original hearing; but the rule is a most valuable one, that the Court will not interfere with the decision of the Taxing Master in a question of amount, unless a gross mistake has been made. If this were not so, a large part of the time of the High Court and of the Court of Appeal would be occupied with questions of taxation. Taxing Masters are, as a rule, solicitors of great experience, and better qualified to decide on the amount of fees to be allowed than the Judges themselves. No doubt it may be said that the circumstances afforded no reason for increasing the fee of the junior counsel on the appeal; but by a long-settled practice there is a well-known relation between the amount of the fees of the leader and the junior, and therefore I do not think it desirable to interfere with the Taxing Master's discretion on this point.

COTTON, L.J.:—

As to the costs of production, it is now the established rule that when documents are produced at the office of the producing party's solicitor, no costs are allowed upon taxation as between party and party for production at the office of his own solicitor, because it is an indulgence to him. The strict rule was for the documents to be deposited at the Record and Writ Clerk's office. It is also well settled that the costs of an inspecting solicitor are not allowed upon such taxation. There is nothing in the Judicature Acts or the new Rules to alter this practice, and in my opinion it ought not to be departed from.

As to refreshers. The practice of allowing them has been adopted in the Chancery Divisions from the Common Law Divisions, and therefore, in my opinion, we ought to follow the rule in the Common Law Divisions; and by that rule, where the trial has occupied less than the time of one whole day, no refreshers are allowed.

On the third point, I entirely agree with the Master of the Rolls, that it is not advisable to interfere with the Taxing Master's discretion.

LUSH, L.J.:—

I entirely concur in all that has been said by the other members of the Court. At Common Law there has hitherto been no place for depositing documents ordered to be produced, and therefore a Common Law suitor had no right to have documents deposited at any particular place. Hence it became the practice to order production at the office of the producing party's solicitor, which was the only place where inspection could take place; and therefore the costs of such an inspection were allowed at Common Law. But now that we have a central office for all the Divisions of the High Court, it is very desirable, in my opinion, that some rule should be framed which shall provide for uniformity of practice in all the Divisions.

Solicitors for Appellants: *Bolton & Co.*
Solicitors for Respondent: *Learoyd & Co.*

C. A.
1880
C. J. B.
July 19.
C. A.
1881
Jan. 27.

Ex parte NEWITT. *In re* GARRUD.

Building Agreement—Forfeiture—Waiver—Power for Landlord to seize Materials on Default of Builder—Seizure after Act of Bankruptcy by Builder—Bill of Sale—Registration—"Licence to take Possession of Personal Chattels as Security for any Debt"—Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 7.

A building agreement between a landowner and a builder contained a stipulation that the landowner, upon the default of the builder in fulfilling his part of the agreement, might re-enter upon the land and expel the builder, and that on such re-entry all the materials then in and about the premises should be forfeited to and become the property of the landowner "as and for liquidated damages":—

Held, that this stipulation was not a bill of sale within the meaning of sect. 7 of the *Bills of Sale Act*, 1854, inasmuch as, though it was a "licence to take possession of personal chattels," the possession was not to be taken "as security for any debt."

Decision of *Bacon*, C.J., reversed.

Semble, that if the ground of forfeiture was the omission of the builder to complete the buildings on the day appointed by the agreement, and the landowner had after that day made advances of money to the builder for the purposes of the agreement, or had in any other way treated the agreement as still subsisting, he would have waived the forfeiture.

The decision in *Doe* v. *Brindley* (1) questioned.

Under such a stipulation, the interest of the builder in the materials being a defeasible one, the right of the landowner to seize is not defeated by the commission of an act of bankruptcy by the builder before the seizure is made. The trustee in bankruptcy of the builder takes subject to the right of the landowner under the agreement.

ON the 28th of August, 1877, an agreement was entered into between *Robert Goddard*, thereinafter called the lessor, of the one part, and *John Garrud*, a builder, thereinafter called the lessee, of the other part. By it the lessee agreed that he would, to the satisfaction of the lessor or his surveyor and within the periods thereinafter mentioned, erect, build, and complete for habitation, on each and every of the plots of land situate in *Alexandra Road, Wimbledon*, therein mentioned and described, a semi-detached messuage or dwelling-house, with offices, all of good, new, and sound materials, in a workmanlike manner and in accordance with the plans, elevations, and specifications to be

(1) 12 Moo. C. P. 37.

approved by the lessor, and construct all the requisite and proper fences and drains, &c., and lay out as a garden such of the front part of each of the said plots as should not be built upon, and during the term thereby agreed to be granted would keep the said messuages or dwelling-houses and offices, with the fences, drains, and front gardens, in good order, repair, and condition. Each pair of houses was to be of the clear annual rental value of not less than £60, and one pair, on plots 15 and 16, was to be completed for habitation by or before the 29th of September, 1877; two other pairs, upon plots 17, 18, 19, and 20, by or before the 25th of December, 1877; two other pairs, upon plots 21, 22, 23, and 24, by or before the 25th of March, 1878; two other pairs, upon plots 25, 26, 27, and 28, by or before the 24th of June, 1878; and two other pairs, upon plots 29, 30, 31, and 32, by or before the 29th of September, 1878. In all respects time was to be considered of the essence of the contract. The lessee was to expend upon each of the houses, with the necessary offices, fences, drains, and gardens, not less than £350. When and as soon as the lessee should from time to time have erected and covered in any of the houses to the satisfaction of the lessor or his surveyor, and should in other respects have performed the agreement, so far as the same should then be performed, the lessor agreed that he would, at the request of the lessee and at his cost, grant to the lessee, or to such person as he might appoint in that behalf, a lease or leases, and the lessee agreed that he, or such person as he might or should have appointed, would accept and execute a counterpart or counterparts of such lease or leases of the house or houses so erected, with the garden and appurtenances and the plot of land upon which each of the same respectively should have been erected, for the term of ninety-nine years from the 25th of December, 1872, at the rents and upon the terms and conditions therein respectively mentioned. "Provided always that, notwithstanding anything herein contained, when the said lessee shall request a lease or leases of any house or houses erected and covered in as aforesaid to be granted, it shall not be incumbent upon the said lessor to grant such lease or leases unless another house or other houses shall be in course of erection upon which no lease or leases shall have been granted, and upon which and for work done and materials fixed thereon a sufficient

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sum shall have been expended in the opinion of the said lessor or his surveyor to secure the due completion of the house or houses upon which such lease or leases have been requested to be granted." The agreement contained also the following clause: "That if the rent hereby agreed to be paid or secured, or any part thereof, shall be in arrear and unpaid for twenty-one days, whether the same shall be demanded or not, or if the said lessee shall not in all things perform and observe all things herein contained, and the covenants agreed by the said lessee to be contained in the said leases, so far as the same are applicable to the land or plots of which no lease or leases have been granted, or if the said intended erections, constructions, and buildings, drains, fences, and gardens, or any of them, shall not be commenced, or shall at any time be left in an unfinished state, and for the space of twenty-eight days not regularly proceeded with as herein provided, then, notwithstanding that no lease may have been granted in pursuance of this agreement, it shall be lawful for the said lessor, into and upon the said pieces or plots of land, and the messuages, dwelling-houses, or premises then erected or built, or begun to be erected or built thereon, or any part thereof in the name of the whole, to re-enter, and the same premises thenceforth to repossess and enjoy, and expel therefrom the said lessee, as if these presents had not been made, and that on such re-entry all such buildings, erections, constructions, materials, and things then in and about the said premises shall be forfeited to and become the property of the said lessor, as and for liquidated and settled damages; and from and after such re-entry the present agreement, and every clause, matter, and thing therein contained which shall not have been then performed, shall thenceforth cease and be void."

It was further agreed that nothing in the agreement contained should operate or be deemed to operate as an actual or present demise of the premises, or any part thereof, "it being the true intent of these presents that the said lessee shall have the right only to enter upon the said plots of land for the purpose of the due performance of this agreement and not otherwise, and in default of such due performance then the right and interest of the said lessee shall absolutely and irrevocably cease."

Similar agreements were entered into between *Goddard* and

Garrud on the 27th of January, 1878, and the 24th of December, 1878, in relation to some plots of land at *Anerley*. The agreements were not registered under the *Bills of Sale Act*, 1854.

On the 22nd of February, 1879, *Garrud* filed a liquidation petition in the *Kingston* County Court, and on the same day *Goddard* gave him notice that he had taken possession of the plots, Nos. 25 to 32 inclusive, of the *Wimbledon* property, and of the *Anerley* property, and also of all the materials and things thereon.

The possession taken was only a formal one, and it was disputed, in reference to the *Anerley* property, whether it was taken before or after the filing of the liquidation petition. The houses upon the plots of which possession was then taken had not been completed within the times specified in the agreements, but it was alleged that after the expiration of those times *Goddard* had made advances of money to *Garrud* for the purposes of the agreements. The evidence shewed, in the opinion of the Court, that the houses upon the plots of which possession had been taken had for the space of twenty-eight days not been regularly proceeded with in accordance with the agreement. The trustee in the liquidation claimed the materials which had been seized by *Goddard*, and this claim was resisted by the executors of *Goddard*, who had died. The County Court Judge held that the trustee's claim was well founded, on the ground that the agreements ought to have been registered as bills of sale, as being, within the meaning of sect. 7 of the Act, "licences to take possession of personal chattels as security for a debt." The executors appealed to the Chief Judge.

The appeal was heard on the 19th of July, 1880.

Atherley Jones, for the Appellants:—

A building contract of this nature is not an instrument which requires to be registered under the *Bills of Sale Act: Brown* v. *Bateman* (1). The builder is a mere licensee, until the buildings are completed. He goes on the land only for the purpose of building the houses; and if he fails he loses all interest in the property. The case is not like *Exparte Mackay* (2).

The goods were not in the apparent possession of the debtor:

(1) Law Rep. 2 C. P. 272. (2) Law Rep. 8 Ch. 643.

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Ex parte Marrable (1). The learned Judge seemed to think that if there had been a breach, *Goddard* had waived it. The evidence shews that there had been a breach, arising from the neglect of the debtor, owing to his want of means, to "regularly proceed with" the building, and that there was no waiver. And there is nothing to shew that when *Goddard* entered he had heard of the debtor's insolvent circumstances. The trustee can have no better right to this money than the debtor himself had; and if so, the Court will not exercise jurisdiction: *Ex parte Dickin* (2).

Winslow, Q.C., and *Nicholson*, for the trustee, were not heard.

BACON, C.J.:—

In my opinion the argument has travelled over a wider field than the circumstances of the case require. In reality it is a very simple case. It has been argued that the builder was the mere licensee of the landowner. I cannot adopt that conclusion. The agreement gave him a right to use his own property. What was there to disturb him in the possession of his own property? Nothing; but if the lessee should not in all things perform his covenants, or if the building should for a certain space of time not be regularly proceeded with, the lessor was to be at liberty to enter, and the goods were to be forfeited to him and to become his property. The language of the instrument is clear. The materials and things are left in the builder's possession; and it is only by mere twisting of the words that any other construction can be arrived at.

It becomes unnecessary therefore to go into matters which really have no application to the subject. *Newitt's* evidence has been contradicted in many particulars. But he thinks that by simply going on to the land he took possession of these goods. That is not taking possession. When the manager and receiver appointed by the Court of the debtor's estate took possession, there was nobody there to dispute his right.

The law of the case has been argued; but the doctrine of the authority which has been mainly relied on has no application here. These goods were clearly the property of the debtor, and were

(1) 1 Gly. & J. 402. (2) 8 Ch. D. 377.

never the property of the lessor. If the lessor claims them, where is the inventory specifying by description the goods which he says were his? It does not exist. The order of the County Court was, in my opinion, quite right, both on the facts of the case and on the law, and the appeal must be dismissed.

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From this decision the executors of *Goddard* appealed. The appeal was heard on the 27th of January, 1881.

C. A.

Millar, Q.C., and *Atherley Jones*, for the Appellants:—

The agreement did not require registration as a bill of sale. The land continued the property of *Goddard*, and the builder had a right to bring building materials upon it only for the purpose of performing his agreement.

[JAMES, L.J.:—They were his materials; he did not make a present of them to you by bringing them on the land. Your right depended on the forfeiture clause.]

The definition of a bill of sale in sect. 7 of the *Bills of Sale Act*, 1854, does not apply, for if the agreement was "a licence to take possession of personal chattels," it was not as "security for a debt." The chattels seized were to be forfeited to the landowner "as liquidated damages." In *Brown* v. *Bateman* (1), a building agreement containing a clause of forfeiture very similar to that in the present case was held not to require registration under the *Bills of Sale Act*.

[JAMES, L.J., referred to *Ex parte Jay* (2), and said that in *Brown* v. *Bateman* all materials brought upon the premises by the builder for the purpose of erecting the buildings were to be considered as immediately attached to the premises, and were not to be removed without the landowner's consent. In the present case, if the builder had removed the materials before the landowner had re-entered, the latter would have had no right to them.]

No doubt that would be so. But agreements of this kind are not *ejusdem generis* with the instruments which are specifically mentioned in sect. 1, and therefore the words "other assurances of personal chattels" do not apply: *Brown* v. *Bateman*; *Blake* v.

(1) Law Rep. 2 C. P. 272. (2) 14 Ch. D. 19.

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Izard (1). The Judge of the County Court thought that the case was governed by *Ex parte Mackay* (2); but that was only a decision that an agreement for a bill of sale, if relied upon as an equitable assignment of the property, must be registered as a bill of sale. In *Ex parte Jay* (3) the decision turned upon there being a proviso for forfeiture in the event of the builder's bankruptcy; there was no suggestion that the *Bills of Sale Act* applied.

It is said that there was a waiver of the forfeiture.

[BRETT, L.J.:—If you rely upon the buildings not being completed on a certain day, and after that day you allow the builder to bring more materials on to the land, would not that be a waiver of the forfeiture?]

No, for it is a continuing contract. It is like the case of a default in payment under a mortgage deed. If the builder was induced by the landowner to bring materials on the land after the forfeiture had accrued, that might be a fraud which would prevent him from insisting on his legal right, but the legal right would remain.

[JAMES, L.J.:—If the day for completion had passed, and then, with the knowledge and acquiescence of the landowner, the builder finished the houses, could the landowner seize the materials? No new day being appointed for completion, how does the default continue?

COTTON, L.J.:—Would it not be a waiver if there was an option to forfeit on a certain day, and after that day the landowner advanced the builder money to enable him to go on with the work?

JAMES, L.J.:—If that was not a waiver the landowner would be able to make the builder repay the money which he had advanced, and also to seize all the materials which he had bought with the money.]

In *Doe* v. *Brindley* (4) it was held that a forfeiture of a lease for a default in completing some houses by a certain day was not waived by the lessor's permitting the lessee to employ some workmen in completing the houses for about three weeks after the

(1) 16 W. R. 108.
(2) Law Rep. 8 Ch. 643.
(3) 14 Ch. D. 19.
(4) 12 Moo. C. P. 37.

forfeiture had accrued. The *onus* of proving that there has been a waiver is on the builder.

But in the present case there was also the continuing default in not proceeding regularly with the houses for twenty-eight days.

Winslow, Q.C., and *F. Cooper Willis*, for the trustee:—

The principle of *Brown* v. *Bateman* (1) does not apply; there the landlord had by the agreement an equitable interest in the chattels as soon as they were brought on to the land; the chattels became part of the land. In *Ex parte Cooper* (2) a simple receipt for the purchase-money of goods attached to an inventory of them was held by this Court to require registration as a bill of sale. Such a document was not *ejusdem generis* with the documents mentioned in sect. 7 of the Act. It has been held that the Act applies to a sale of goods when they are left in the possession of the vendor. The present agreement is a "licence to take possession of personal chattels," and it is "as security for a debt," for the landowner takes what he seizes in discharge, or *pro tanto* in discharge, of damages for the breaches of contract. If the parties had agreed the damages at a fixed sum, that sum would have been provable in bankruptcy as a debt: *Bankruptcy Act*, 1869, s. 31. Clauses of forfeiture are always construed very strictly.

[BRETT, L.J.:—The words "as and for liquidated damages" are inserted in favour of the builder; if they were not there the landowner could also bring an action for damages for the breach of the agreement.]

The forfeiture is a security for the liquidated damages.

[BRETT, L.J.:—They are only liquidated by the seizure.

JAMES, L.J.:—"Liquidated damages" only means that the things seized are to be taken in full satisfaction.]

The evidence shews that the forfeiture was waived.

Another objection is that, as regards the *Anerley* property, the seizure was not made till after the builder had committed an act of bankruptcy by filing his liquidation petition. The license was to seize the goods of the debtor; they were not to become the

(1) Law Rep. 2 C. P. 272. (2) 10 Ch. D. 313.

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goods of the landowner until he seized them, and before he exercised his right to seize them they had become the goods of the trustee, for his title relates back to the filing of the petition.

[COTTON, L.J.:—Suppose the builder had sold the materials to a third person, who had left them on the land, would this assignment for value have defeated the right of the landowner to seize? If not, why should the trustee in bankruptcy of the builder stand in a better position?]

We admit that a purchaser from the builder would take subject to the right of the landowner, but the trustee in bankruptcy has a higher right. If the landowner took any interest in the materials before the seizure, the reputed ownership clause (sect. 15) would apply.

JAMES, L.J.:—

Upon the point which was mainly discussed in the County Court, viz., whether this building agreement was a bill of sale within the meaning of the Act, with all respect to the learned Judge I am unable to concur in his view. It appears to me that this case does not in substance differ, at any rate in favour of the Respondent, from any of the cases which have been cited to us. The provision is that on the re-entry of the landowner the materials shall be forfeited to him and become his property "as and for liquidated and settled damages" for the breach of the agreement by the builder.

In my opinion this provision is not within the first part of the definition in sect. 7 of the Act—"assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels."

It does indeed come, to a certain extent, within the words which follow—"and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt." It was no doubt "an authority or licence to take possession of personal chattels," but not as security for a debt. We have no power to add to the Act for the purpose of making this security for the performance of the contract, which was *bonâ fide* taken by the landowner, bad by reason of the bankruptcy of the builder. We

can only apply the Act so far as it goes, and, in my opinion, the present case is not within the words.

Another point which has been raised is, that the forfeiture by the default of the builder has been waived by the landowner. If this had been confined to a default in completing the houses at the date fixed, and the landowner had, after that date, gone on dealing with the builder on the footing of the agreement being still subsisting, I might have thought that this would have amounted to a waiver. It would require a good deal of consideration before I could assent to the decision of the Court of Common Pleas in *Doe* v. *Brindley* (1). But this point does not really arise for decision, because here there was a continuing agreement that the houses should not be left unfinished for twenty-eight days without a proper expenditure of labour upon them, and it appears to me to be proved by the evidence beyond all reasonable doubt that the houses in question were left unfinished for twenty-eight days without a proper expenditure of labour upon them.

Another point taken before us, which does not appear to have been really argued before the Judge of the County Court, was this—that the seizure was not made in sufficient time, that it was not made before the filing of the liquidation petition. To my mind it is immaterial at what particular moment the seizure was made. The broad general principle is that the trustee in a bankruptcy takes all the bankrupt's property, but takes it subject to all the liabilities which affected it in the bankrupt's hands, unless the property which he takes as the legal personal representative of the bankrupt is added to by some express provision of the bankrupt law. There is no such provision applicable to the present case. The building agreement provides, in effect, that in a certain event certain property of the builder may be taken by the landowner in full satisfaction of the agreement. It appears to me analogous to a sale of property with a power of repurchase in a certain event. I am of opinion that this point fails like the others. I think that the Judge of the County Court has miscarried, and that the *Bills of Sale Act* does not apply, and I am of opinion that the landowner is entitled at Law and in Equity, as he certainly is morally, to the benefit of the stipulation in the agreement.

(1) 12 Moo. C. P. 37.

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BRETT, L.J. :—

It appears to me that the present agreement is not void, upon the principle of our decision in *Ex parte Jay* (1), as being a fraud on the bankruptcy law. It was therefore an existing legal stipulation. Then the question arises, whether it is to be considered as a bill of sale, and therefore void as against the trustee under the liquidation for want of registration. In my opinion, the cases of *Brown* v. *Bateman* (2) and *Blake* v. *Izard* (3) are strong authorities upon the construction of the first part of sect. 7 of the *Bills of Sale Act*, that such a stipulation does not come within the words "other assurances of personal chattels." They were stronger cases than the present, and they were so decided for reasons in which I entirely concur. I am certainly not prepared to overrule those decisions. The only question therefore is, whether this stipulation comes within the words "licenses to take possession of personal chattels as security for any debt." It seems to me obvious that it does not; for there was no debt in the present case, and if there was, the chattels were taken, not as security for, but in discharge of the debt. The case does not come within the words of the Act, and therefore this objection fails.

Then it is said that the forfeiture has been waived. It is not necessary now to decide judicially whether there has been a waiver of the forfeiture arising by the non-completion of the houses on the days fixed by the agreement, but the strong inclination of my opinion is that an advance of money by the landowner to the builder to enable him to carry out his agreement would be cogent evidence of a waiver of the forfeiture. But in the present case there is another ground of forfeiture alleged, viz., that the builder was for twenty-eight days not proceeding with the buildings in a regular manner according to the provisions of the agreement. The landowner gave the strongest *primâ facie* evidence of this, such evidence as that, if it was not answered, we ought to act upon it. The builder might have answered this evidence, if he had chosen; he has not done so, and it seems to me that he had no answer.

Then it is objected that, as respects the *Anerley* property, the landowner's entry was ineffectual, because it was made after the

(1) 14 Ch. D. 19. (2) Law Rep. 2 C. P. 272.
(3) 16 W. R. 108.

filing of the liquidation petition, that is to say, that the mere fact of the commission of an act of bankruptcy by the builder took away the rights of the landowner under the agreement. It seems to me that the answer which Mr. *Winslow* gave to a question put to him by my Brother *Cotton* is conclusive on this point. He admitted that a transfer of the materials for value by the builder to a third party would not have defeated the rights of the landlord. No more, I think, can the bankruptcy of the builder.

COTTON, L.J.:—

I am of opinion that the agreement is not a bill of sale within the meaning of the Act. It is not necessary for me to refer to any of the authorities which have been cited. The only words in the definition of a bill of sale given by sect. 7 which are said to include this agreement are these—"powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt." This stipulation is, no doubt, an authority or licence to take possession of personal chattels. But we must look at the whole of the definition. The possession is to be "as security for a debt." What is the debt in the present case? I say there is none. It is said that under the *Bankruptcy Act* damages are a debt. But that is a fallacy. By virtue of sect. 31 of the *Bankruptcy Act*, damages may be proved in bankruptcy as a debt, but that does not make them a debt for the purposes of another Act of Parliament. In my opinion there was no debt in the present case for which the possession was to be a security.

Then it is said that the events have not happened on which the landowner was entitled to forfeit the agreement. I am of opinion that they have. I do not rely upon the stipulation that the houses should be completed by certain days. A right of forfeiture is an option to determine a contract in a certain event or certain events, and if, after the happening of a single event which gives the right to forfeit, the person who is entitled to the benefit of the forfeiture treats the contract as still subsisting, that would be a waiver of his right of forfeiture. But in the present case there was the other stipulation that the landowner should have the right of forfeiture if the houses should be left in an unfinished state and not regularly proceeded with for twenty-

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eight days, and in my opinion the evidence shews that this was the case.

Another point was taken which appears not to have been raised before the present appeal, that the possession as regards the property at *Anerley* was not taken till after the filing of the liquidation petition. But if, as is admitted, the rights of the landowner under the agreement could not have been defeated by a transfer of the chattels for value, so long as they remained on the land, by what provision of the *Bankruptcy Act* is the landowner placed in a worse position as against the trustee? None has been pointed out to us. The order and disposition clause does not apply, because the landlord was not the true owner of the chattels until he had exercised his right to take possession of them.

Solicitor for Appellants: *S. G. Ashwin.*
Solicitor for Respondent: *H. Montagu.*

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Ex parte McLAREN. *In re* McCOLLA.

Composition — "Extraordinary Resolution" — Secured Creditor — Execution levied before Registration—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.

A non-assenting creditor of a compounding debtor under sect. 126 of the *Bankruptcy Act,* 1869, against whom no equity can be raised by reason of his personal conduct, can acquire a valid security for his debt by levying an execution on the debtor's goods at any time before the registration of the extraordinary resolution accepting the composition.

The resolution does not become an "extraordinary" one until it has been confirmed at the second meeting of the creditors, and it has no validity whatever until it is registered.

The mere fact that a judgment creditor, who is entered in the debtor's statement of affairs as having no security for his debt, is present in silence at the first meeting of the creditors, not proving his debt or taking any other part in the proceedings, will not raise an equity against him so as to prevent his levying an execution on his judgment, and thus acquiring a valid security for his debt before the registration of an extraordinary resolution accepting a composition.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, acting as Chief Judge in Bankruptcy.

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On the 3rd of August, 1880, *J. G. H. McColla* filed a liquidation petition. The first meeting of the creditors was held on the 2nd of September, and was adjourned to the 9th of September. On that day a resolution was passed to accept a composition of 3*s.* in the pound. On the 13th of September Messrs. *McLaren & Walker*, who had obtained judgment in an action in the Queen's Bench Division against *McColla* for £128 4*s.* 5*d.*, issued execution on their judgment, and the sheriff seized goods of *McColla*. On the 17th of September *McLaren & Walker* issued execution on a judgment for £75 14*s.* 2*d.* against *McColla* in another action in the Common Pleas Division, and the sheriff seized his goods. Both the actions had been commenced before the filing of the liquidation petition, and in both of them final judgment was signed after the meeting on the 2nd of September. On the 18th of September an order was made by Mr. Registrar *Murray*, as Chief Judge, restraining *McLaren & Walker* from taking any further proceedings in their actions, and from proceeding upon any judgment or execution therein respectively, until after the 25th of September. On the 21st of September the second meeting of the creditors was held, and the composition resolutions were confirmed. They were registered on the 24th of September. On the 25th of September the injunction granted on the 18th of September was continued, and on the 14th of October it was made absolute by Mr. Registrar *Brougham*.

McLaren & Walker did not prove their debts in the composition proceedings. They were entered in the debtor's statement of affairs as unsecured creditors. *McLaren*, one of the members of the firm, was present at the first meeting on the 2nd of September, but he took no part whatever in the proceedings, and did not even address a word to the meeting. No one on behalf of the firm took any part in the proceedings at either of the other meetings.

McLaren & Walker appealed from the order of Mr. Registrar *Brougham*.

E. Cooper Willis, for the Appellants:—

No doubt if the creditors had at the second meeting resolved upon a liquidation by arrangement we should have lost the benefit

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of our execution. But they did not. The resolution of creditors to accept a composition under sect. 126 must be an extraordinary resolution, *i.e.*, a resolution passed at one meeting and confirmed at another; the resolution has no existence at all until it has been completed by confirmation at the second meeting, and till then it is not binding on any one. No doubt if a man had voted at the meeting as an unsecured creditor he could not afterwards in the character of a secured creditor take any property from the unsecured creditors. But the present Appellants have done nothing to raise any equity against themselves. In *Ex parte Jones* (1), it was held that a resolution for composition has no retrospective effect so as to invalidate an execution levied by a creditor between the filing of the petition and the first meeting of the creditors. I seek to carry this doctrine further.

[Brett, L.J.:—Your argument must go to this extent, that a security obtained at any time before the registration of the composition resolution would be valid; sect. 126 says that until registration has taken place the resolution "shall be of no validity."]

I must go to that extent. In *Ex parte Jameson* (2) the execution was levied after the registration of the composition resolution, and the execution creditor voted at the second meeting in favour of the composition; for this reason he was held to be bound by the composition.

Winslow, Q.C., and *Doria*, for the debtor:—

Can a creditor who is present at a meeting, and who by his silence acquiesces in the debtor's statement that he is an unsecured creditor, afterwards acquire a valid security as against the other creditors? The creditors pass their resolution on the basis of the debtor's statement of affairs, and if a creditor who is entered in it as unsecured is present at the meeting and keeps silence, he misleads the other creditors who are there. It would be a breach of faith for him to levy an execution after that.

[James, L.J.:—What is the equity against him? There was neither *suggestio falsi* nor *suppressio veri*.]

The principle of *Ex parte Jameson* applies.

(1) Law Rep. 10 Ch. 663. (2) 3 Ch. D. 488.

[James, L.J.:—If he was present and did not prove his debt, that was a plain intimation that he was reserving his rights.]

It is plain from what Lord Justice *Mellish* said in *Ex parte Jones* (1) that he thought the first meeting was the dividing line, and in *In re Lennard* (2) Lord Justice *James* expressed his adherence to what was said in *Ex parte Jones*.

[Cotton, L.J., referred to sects. 129, 130 of the *Companies Act*, 1862, upon the construction of which it has been held that the voluntary winding-up of a company dates from the passing of the confirmatory resolution: *Weston's Case* (3).]

Section 126 speaks of the extraordinary resolution being "passed" at the first meeting, and it is so described in rules 279, 282, 283 of the Bankruptcy Rules, 1870. When the resolution is registered it is to take effect from the time of its being passed at the first meeting; otherwise, a composition could always be defeated by non-assenting creditors levying executions between the two meetings.

[Cotton, L.J.:—There is no extraordinary resolution till the confirmation at the second meeting.]

The resolution is not fully and completely binding until then, but when it is registered it is to be binding on all the creditors whose names and addresses, and the amount of whose debts are shewn in the debtor's statement produced at the first meeting, which must mean upon the creditors as they appear in the statement. The resolution must be binding as from the time when the statement is produced, unless the statement is afterwards altered with the consent of a general meeting of the creditors under the power given to them in sect. 126. If this is not so, there would never be any basis for the resolution. If the debtor had obtained an injunction sooner the Appellants could not have levied their execution, and the rights of the parties cannot be altered by an exercise of the discretionary power to grant injunctions which is conferred on the Court by rule 260: *Ex parte Rocke* (4).

(1) Law Rep. 10 Ch. 663.
(2) 1 Ch. D. 177, 180.
(3) Law Rep. 4 Ch. 20.
(4) Ibid. 6 Ch. 795.

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JAMES, L.J.:—

In my opinion the execution creditors have a clear right to retain the benefit of their execution. They had obtained a judgment, and they put it in force by levying upon their debtor's goods, and, at the time when the sheriff levied, they were under no obligation not to enforce their legal right. It is suggested that they are bound by the composition proceedings, because one of them was present at the first meeting of the creditors, though he did not even open his mouth. It would be a very strong thing to say that this could raise an equity against the Appellants. There being no equity against them, how are they bound by the Act. An extraordinary resolution did not exist until the resolution passed at the first meeting had been confirmed at the second, and sect. 126 expressly says that the resolution "shall be of no validity" until registration has taken place. There is nothing, therefore, to deprive the Appellants of their legal right.

BRETT, L.J.:—

It seems to me that the Appellants have done nothing to raise an equity against themselves. The case must be considered just as if they had not been at the meeting at all, and therefore one of the grounds of the decision in *Ex parte Jameson* (1) does not apply.

The question, therefore, is whether, when the Appellants obtained their security by means of the seizure by the sheriff, anything had happened which prevented them from enforcing it? The only thing which could affect their right would be the existence of an extraordinary resolution of the creditors under sect. 126. Was there any such resolution in existence when they obtained their security? If there was not, the decision in *Ex parte Jones* (2) is in their favour. The answer to this question depends on the construction of sect. 126. When is there an extraordinary resolution? The section says that "an extraordinary resolution of creditors shall be a resolution which has been passed by a majority in number and three-fourths in value of the creditors of the debtor, assembled at a general meeting. . . . and has been confirmed by a majority in number and value of the

(1) 3 Ch. D. 488. (2) Law Rep. 10 Ch. 663.

creditors assembled at a subsequent general meeting." There is, therefore, no extraordinary resolution within the meaning of the Act, at least until the resolution passed at the first meeting has been confirmed at the second meeting. And it seems to me further that there is no valid resolution at all until after registration, for there are distinct negative words in sect. 126,—"until such registration has taken place such resolution shall be of no validity." If the resolution is of no validity, what effect can it have on any one's rights? In my opinion, therefore, a valid security may be obtained by any creditor, who has not shut himself out from so doing by some equity, at any time before the extraordinary resolution has been registered. I think the Registrar has misconceived the meaning of what was said by Lord Justice *Mellish* in *Ex parte Jones* (1).

COTTON, L.J.:—

A creditor has a legal right to proceed against his debtor, and to obtain the benefit of an execution on his goods, unless his own conduct or some statutory provision has deprived him of his right. With regard to conduct, one of the Appellants was no doubt present at the first meeting, but he took no part in the proceedings, he did not say a word, and he did not prove his debt. It is said that he acquiesced in the debtor's statement that he had no security for his debt. I am of opinion that there was no acquiescence. The mere fact that he did not say that he intended to exercise his legal right was no acquiescence in the debtor's statement of affairs, which did not mention that he had that right. There was no misleading of the other creditors. If a creditor votes in favour of a resolution which proceeds upon the footing of a statement by the debtor that he has no security for his debt, that might give rise to an equity against his afterwards acquiring or enforcing a security for the debt. But there is no possible equity in the present case; there was no misleading of the other creditors, no holding out to them by the Appellants that there was no security.

As to the construction of the Act, the question is, whether there is anything in it to deprive the Appellants of their rights?

(1) Law Rep. 10 Ch. 663.

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They could only be bound by an extraordinary resolution of the creditors, and at the time when the resolution was passed by the first meeting, a resolution no doubt existed, but it did not become an extraordinary resolution until it had been confirmed by the second meeting. Then and then only did it become an extraordinary resolution. Till then there did not exist that resolution which sect. 126 says shall be binding on the creditors. In the course of the argument I suggested that there is an analogy between sect. 126 of the *Bankruptcy Act*, 1869, and sects. 129 and 130 of the *Companies Act*, 1862. Sect. 130 provides that "a voluntary winding up shall be deemed to commence at the time of the passing of the resolution authorizing such winding up," and in *Weston's Case* (1) the Court of Appeal decided that, when the resolution is a special one, passed at one meeting and confirmed at another, "the passing of the resolution" means the confirmation by the second meeting, and that then only does it become a resolution "authorizing a winding-up," and that, consequently, the commencement of the winding-up dates from the passing of the confirmatory resolution. In my opinion, on the construction of the *Bankruptcy Act*, until the resolution has become an extraordinary one no creditor is, except by his personal conduct, precluded from exercising his legal rights against the debtor, and he can exercise those rights between the two meetings, the joint vote of which is to constitute the legal resolution which binds him.

James, L.J.:—

As the point has been raised, I think it is better to say that we are all of opinion that the resolution has no legal validity whatever until it has been registered.

Solicitors for Appellants: *Bellamy, Strong, & Co.*
Solicitor for Debtor: *C. T. Foster.*

(1) Law Rep. 4 Ch. 20.

Ex parte BENNETT. *In re* WARD.

C. A. 1881 Feb. 3.

Adjudication of Bankruptcy — Subsequent Resolutions for Liquidation by Arrangement—Appointment of Liquidation Trustee—Subsequent Appointment of Bankruptcy Trustee—Vesting of Debtor's Property—Bankruptcy Act, 1869, *ss.* 17, 28, 83 (*sub-s.* 6), 125—*Bankruptcy Rules*, 1870, *r.* 266.

After an ordinary adjudication of bankruptcy has been made (not an adjudication merely for the purpose of protecting the debtor's property pending proceedings for liquidation or composition) the creditors have no power to pass resolutions for either liquidation or composition, and such resolutions if passed will be inoperative.

Ex parte Milward (1) explained and followed.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 20th of March, 1880, the *General Life and Fire Assurance Company* presented a bankruptcy petition against *Robert Ward*, and, after various adjournments, an adjudication of bankruptcy was made against him on the 7th of May, 1880. On the 6th of May *Ward* had filed a liquidation petition, and on this ground the Registrar, when he made the adjudication, was asked to stay the proceedings under it, but he refused to do so. The first meeting of the creditors under the liquidation petition was held on the 24th of May, when resolutions were passed in favour of a liquidation by arrangement, and *T. J. W. Bennett* was appointed trustee. On the 26th of May the first meeting of the creditors under the bankruptcy was held, and was adjourned to the 9th of June. On the 4th of June an application was made to the Registrar to register the liquidation resolutions, and he considered that he was bound, by the decision of the Chief Judge in *Ex parte Davis* (2), to register them for what they were worth, and they were accordingly registered. On the 9th of June the adjourned first meeting of the creditors under the bankruptcy was held, and *H. J. Pratt* was appointed trustee. On the 18th of June the bankrupt applied to the Registrar to annul the adjudication, and his application was refused. An appeal from this refusal was, on the 22nd

(1) *Ante*, p. 256. (2) 2 Ch. D. 231

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of July, 1880, dismissed by the Court of Appeal, on the ground that it was brought too late (vide *Ex parte Ward* (1)). On the 17th of August the liquidation trustee applied to the Registrar for an order to restrain the bankruptcy trustee from taking possession of or in any way dealing with the bankrupt's property, and also to stay further proceedings under the bankruptcy, and to annul the adjudication, on the ground that resolutions for the liquidation of the bankrupt's affairs by arrangement had been duly registered, and a trustee appointed thereunder in whom the property of the bankrupt had vested, his appointment being prior to that of the bankruptcy trustee. This application was refused, and the Registrar made a declaration that the whole of the bankrupt's property was vested in the bankruptcy trustee, and restrained the liquidation trustee from interfering with the acquisition or retention of the property by the bankruptcy trustee.

The liquidation trustee appealed.

Winslow, Q.C., and *Herbert Reed*, for the Appellant:—

The present case is distinguishable from *Ex parte Milward* (2). There the appeal was from the registration of the resolutions; here there is no appeal from the registration. Moreover, in that case the resolutions were for a composition. In the present case the resolutions are for a liquidation by arrangement, and on the appointment of the trustee in the liquidation the property of the bankrupt, which on the making of the adjudication had vested in the Registrar as trustee, passed from him to the trustee in the liquidation: *Bankruptcy Act*, 1869, sects. 17, 83 (sub-sect. 6), 125 (sub-sects. 4, 5, 6, 7). There is no similar provision applicable to a composition. The Court has ample jurisdiction to prevent the continuance of the bankruptcy proceedings: Rules 260, 289 of the Bankruptcy Rules, 1870. If the proceedings under an adjudication are stayed, still the property of the debtor equally vests in the Registrar on the making of the adjudication, and yet in such a case the adjudication will be annulled on the passing of resolutions for liquidation by arrangement or composition: Rule 266; *Ex parte Foster* (3). If sect. 28 provides

(1) 15 Ch. D. 292. (2) *Ante*, p. 256.
(3) Law Rep. 10 Ch. 59.

the only way of getting rid of an adjudication once made, what is the use of staying the proceedings under it?

Sidney Woolf, for the petitioning creditor, and

E. Cooper Willis, for the bankruptcy trustee, were not heard.

JAMES, L.J.:—

I think it is utterly impossible to distinguish this case from *Ex parte Milward* (1). The decision there did not depend on the fact that the resolutions were for a composition, but on the general ground that, after an ordinary adjudication is made, there is nothing upon which proceedings for either liquidation or composition can be founded. I cannot distinguish the two cases.

BRETT, L.J.:—

If the property of the debtor did not vest in the trustee in the bankruptcy, it seems to me that all the ideas one has ever had about the effect of an adjudication of bankruptcy must be done away with. It is not necessary for me to say whether I agree in every respect with *Ex parte Milward*, but it is impossible to see any distinction between it and the present case. The reasons given by the Judges who decided *Ex parte Milward* apply, and the present case falls within the words used by all of them; it appears to me to be word for word, fact for fact, and circumstance for circumstance, identical with *Ex parte Milward*.

COTTON, L.J:—

I also am of opinion that the case comes exactly within the principle of *Ex parte Milward*, and that the distinction which has been suggested makes no difference. It is said that, in the present case, sect. 17, combined with sect. 125, has the effect of making the debtor's property, which had already vested in the Registrar as trustee, vest in the liquidation trustee on his appointment. To support that argument it must be assumed that valid resolutions for liquidation by arrangement exist. But the principle of the decision in *Ex parte Milward* is, that, after an adjudication is made,

(1) *Ante*, p. 256.

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the power of the creditors to pass resolutions for either liquidation or composition is gone. Rule 266 contemplates the making of an adjudication, not for the purpose of administering the debtor's assets, but for the mere purpose of protecting the assets until it is seen what course the creditors will adopt; not an ordinary adjudication, such as was made in the present case, but simply proceedings in bankruptcy for the purpose of protecting the assets. I am of opinion, therefore, that this case is covered by our decision in *Ex parte Milward* (1), and I should have arrived at the same conclusion had there been no such decision.

Winslow:—The Appellant ought only to pay one set of costs to the Respondents.

JAMES, L.J.:—The Respondents must have their costs in the usual way.

Solicitor for Appellant: *H. Aird.*
Solicitors for petitioning creditor: *Gush & Phillips.*
Solicitors for bankruptcy trustee: *Lumley & Lumley.*

C. A. 1880 M. R. *Dec.* 4. C. A. *Dec.* 18, 21.

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[1880 S. 1184.]

Practice — Action — Motion—Appointing Receiver after Final Judgment — Whether New Action necessary—"Cause or Matter pending"—Judicature Act, 1873, s. 24—*Rules of Court*, 1875, *Order* XLII.—*Bankruptcy—Execution Creditor—Equitable Execution—Receiver—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 95, *sub-s.* 2; *s.* 125, *sub-s.* 5.

Held, by the Master of the Rolls, that so long as the final judgment in an action remains unsatisfied, the action is a "cause or matter pending" within the meaning of sect. 24, sub-sect. 7, of the *Judicature Act*, 1873, and that consequently, in an action by a creditor against a debtor in which the Plaintiff has obtained final judgment, the Court has power, under that subsection, in order to satisfy the judgment, to grant equitable execution against the Defendant by appointing a receiver upon motion in that action, although the writ may not have been indorsed with a claim for a receiver; it being unnecessary in such case to bring another action for the purpose.

S. recovered judgment for a debt against *C.* and issued an *elegit*. The

(1) *Ante*, p. 256.

sheriff returned that the debtor had no lands which he could seize. *C.* had leasehold property which was subject to mortgages. *S.* thereupon obtained the appointment of a receiver of the rents of the leasehold property without prejudice to the rights of the prior incumbrancers. On the same day a petition for adjudication in bankruptcy was filed against *C.*, and a receiver was appointed in bankruptcy a few minutes before the appointment of the receiver in the action. *C.* afterwards filed a petition for liquidation, the same receiver was appointed in the liquidation as had been appointed in the bankruptcy, and resolutions were passed for liquidation of his affairs by arrangement. *S.* had not, until some days after the appointment of his receiver, any notice that *C.* had committed an act of bankruptcy, or that any proceedings in bankruptcy were pending against him :—

Held, by the Master of the Rolls and by the Court of Appeal, that as, at the time when *S.* obtained equitable execution by the appointment of a receiver, the property was legally though not actually in the possession of the receiver appointed by the Court of Bankruptcy, the equitable execution was ineffectual, and was not protected by sect. 95, sub-sect. 2, of the *Bankruptcy Act*, 1869.

THIS was an action commenced by *Salt* and others against *Cooper* in the Queen's Bench Division for goods sold and delivered, and on the 2nd of September, 1880, judgment was signed for £165 14s., and costs. On the same day a writ of *elegit* was issued, and lodged with the sheriff of *Yorkshire*. It appeared that all *Cooper's* property was in mortgage, the mortgagees being in possession, and the sheriff returned that there were no lands, goods, or chattels which he could seize.

The Plaintiffs, on the 14th of September, obtained from Mr. Justice *Stephen*, sitting in Chambers, an order appointing *Corbidge* to be a receiver of the rents and profits of *Cooper's* leasehold property, such appointment to be without prejudice to the rights of any prior incumbrancers, and if any prior incumbrancer was in possession, then without prejudice to such possession. The writ in the action did not claim a receiver.

On the same 14th of September a petition for adjudication in bankruptcy against *Cooper* was filed in the County Court at *Huddersfield* by a creditor, grounded on an act of bankruptcy committed on the 13th of September, and on the same day *Carter* was appointed receiver and manager by an order of the County Court.

The mortgagees shortly afterwards sold the property, and a surplus remained in their hands after payment of the mortgage

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debts. Previously to the sale, and before the commencement of the liquidation proceedings, both receivers had given notice of their appointments to the mortgagees.

On the 24th of September *Cooper* filed a petition for liquidation, and on the next day *Carter* was appointed receiver in the liquidation.

On the 18th of October resolutions for liquidation by arrangement were passed, and trustees were appointed. The bankruptcy petition was not further proceeded with. The Plaintiffs had no notice until the 29th of September of the bankruptcy petition or of the liquidation proceedings, or of *Cooper's* having committed any act of bankruptcy.

On the 23rd of October an order was made transferring the action to the Chancery Division, and attaching it to the Court of the Master of the Rolls, and on the 29th of October an order was made adding the trustees in liquidation as parties to the proceedings.

On the 3rd of November the Plaintiffs gave notice of motion that the order appointing *Corbidge* receiver might, if and so far as necessary, be extended, so as to enable him to receive all surplus moneys in the hands of the mortgagees arising from the sale of the Defendant's leasehold estates, after payment of all moneys due on their securities, and that the receiver might be directed out of such moneys to pay to the Plaintiffs their debt and costs, and to pay the balance to the trustees under the liquidation.

The motion was heard before the Master of the Rolls on the 4th of December, 1880.

In the course of the argument on the motion before the Master of the Rolls, a discussion arose as to which of the two receivers was appointed first on the 14th of September. It was proved by affidavit that the order appointing the bankruptcy receiver was made by the County Court at a quarter to four in the afternoon, and it was ultimately admitted by the Plaintiffs' counsel that Mr. Justice *Stephen's* order appointing the Plaintiffs' receiver was made not earlier than four o'clock.

Ince, Q.C., and *W. Fooks*, for the Plaintiffs, contended that the appointment of their receiver operated as a good delivery in exe-

cution: Rules of Court, 1875, Order XLII.; *Anglo-Italian Bank* v. *Davies* (1); *Hatton* v. *Haywood* (2); *Ex parte Evans* (3).

Macnaghten, Q.C., and *Oswald*, for the trustees in liquidation:—

We submit that the appointment of the Plaintiffs' receiver was irregular, for a receiver cannot be appointed after final judgment, and here the Plaintiffs did not ask for a receiver by their writ. In *Colebourne* v. *Colebourne* (4) Vice-Chancellor *Hall* held that the writ should be indorsed with a claim for a receiver where that is a substantial object of the action: though the point seems to have been considered an open one in *Anglo-Italian Bank* v. *Davies*. There is no instance of the old Court of Chancery having made an order in a suit for payment of money, and then having, in the same suit, appointed a receiver. To obtain a receiver it was necessary to institute a new suit; and we submit that that practice has not been altered by the Judicature Acts. Moreover, the receiver here was appointed of the "rents and profits" only: the Plaintiffs cannot therefore now ask that he may receive the proceeds of sale.

But there is another objection—and a fatal one—to the Plaintiffs' motion. It now appears that the bankruptcy receiver was appointed before the Plaintiffs' receiver: the title of the trustees in liquidation is the title of the receiver in bankruptcy, and relates back to the date of the act of bankruptcy.

[They were stopped by the Court.]

Ince, in reply:—

I submit that the title of the receiver in bankruptcy ceased to exist when the resolutions for liquidation were passed; so that the title of our receiver then intervened. The liquidation proceedings were distinct from the bankruptcy proceedings, and commenced at the date of the appointment of trustees: *Bankruptcy Act*, 1869, s. 125, sub-s. 5. As we had no notice of the bankruptcy at the time our receiver was appointed, our equitable execution was valid under sect. 95, sub-sect. 2.

Macnaghten:—The title of the receiver in bankruptcy did not necessarily cease, for under the Bankruptcy Rules, 1870, rule 260,

(1) 9 Ch. D. 275.
(2) Law Rep. 9 Ch. 229.
(3) 13 Ch. D. 252.
(4) 1 Ch. D. 690.

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the Court may, at any time after the presentation of a petition, allow any proceedings, "whether in progress at the filing of the petition, or subsequently commenced, to proceed upon such terms as the Court may think just."

JESSEL, M.R.:—

The present motion raises points of great importance, and, I must say, also of very great difficulty.

The first question is, whether, in an action brought in the High Court of Justice, where judgment has been obtained against a debtor and it appears that the debtor is possessed of property, either freehold or leasehold—here it is leasehold—which, by reason of the existence of a prior mortgage vesting the legal estate in some prior mortgagee, cannot be taken by the sheriff under a writ of *elegit*, the Court or the Division of the Court in which the action is brought can give what is called equitable execution, that is, can grant a receiver, on motion only in the original action; or whether it is absolutely necessary and indispensable that before making a motion for a receiver, there should be another piece of paper issued called a writ, with the same plaintiff and the same defendant, but indorsed with a claim for that equitable execution. That is the question I have to decide. It is by no means so trivial as it looks when so stated, because we must not forget that in our law in former times, and not so very long ago, formality produced enormous effects on men's rights. For instance, I need not mention in this Court the magical effect of a seal as regards the operation of writings on various interesting occasions. So that it by no means follows that this is an unimportant question, although, if decided one way, the only result would be that practitioners in future would expend the necessary 5*s.* for the purpose and issue a second writ: and, indeed, until the question is decided by the Court of Appeal, I should advise practitioners to do so, although my own opinion is that it is not necessary.

The question really depends, in my opinion, upon the construction to be put on the *Judicature Act* of 1873; and in putting a construction upon that Act one must have regard to the purview of the Act, and especially to the expressed intention of the Legislature in passing it. I must, first of all, dispose of an argument

which has been addressed to me by counsel as to the application and effect of Order XLII. of the Rules of Court, 1875. In the first place, I accede so far to that argument that I think Order XLII. does not affect this question at all. I think this Order meant to prescribe how execution may be issued by the parties. Though the Order does not say so in so many words, you will see at once, on looking at it, that execution may be enforced in any of the modes in which the judgment might have been enforced at the time of the passing of the Act. Then you find what those modes of enforcement are—writ of possession, writ of sequestration, writ of attachment or committal: then, under rule 6, writs of execution are to include *fieri facias*, *elegit*, and all subsequent writs which may be issued for giving effect thereto; and then the rule goes on to say "any such process," and so on, evidently referring, in my opinion, to the writs.

Then we are thrown back upon the Act itself, and we must recollect, first of all, what the main object of the Act was. It is stated very plainly that the main object of the Act was to assimilate the transaction of Equity business and Common Law business by different Courts of Judicature. It has been sometimes inaccurately called "the fusion of Law and Equity"; but it was not any fusion, or anything of the kind; it was the vesting in one tribunal the administration of Law and Equity in every cause, action, or dispute which should come before that tribunal. That was the meaning of the Act. Then, as to that very small number of cases in which there is an actual conflict, it was decided that in all cases where the rules of Equity and Law were in conflict the rules of Equity should prevail. That was to be the mode of administering the combined jurisdiction, and that was the meaning of the Act. To carry that out, the Legislature did not create a new jurisdiction, but simply transferred the old jurisdictions of the Courts of Law and Equity to the new tribunal, and then gave directions to the new tribunal as to the mode in which it should administer the combined jurisdictions.

That being the position of the tribunal, let us see what the directions were which were given to it. The new tribunal consisted of two divisions, the High Court of Justice—the Court of first instance—and the Court of Appeal. Now let us look, first of all, at sect. 24,

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which is the main section as to the combined jurisdiction. It says that, "In every civil cause or matter commenced in the High Court of Justice, law and equity shall be administered by the High Court of Justice and the Court of Appeal respectively, according to the rules following:" and so forth. Then it says (sub-sect. 1) that if a plaintiff or petitioner wants equitable relief, "the said Courts respectively, and every Judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the like purpose properly instituted before the passing of this Act." Then the 4th sub-section says the Courts shall take notice of all equitable estates, titles, rights, and so on; then the 6th says that the Courts shall give effect to legal rights; and then comes the 7th sub-section, which appears to me to have a very important bearing on the present question, and therefore I will read it. "The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided." Those are very large terms. The clause clearly applies to any remedy whatever; for it says the Court shall grant "all such remedies whatsoever." The claim must be brought forward in the cause, and must relate to the matter in dispute in the cause; but beyond that I see nothing to qualify the clear indication of intention that multiplicity of legal proceedings is to be avoided. I may mention also that it says distinctly, "as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in the cause or matter." It is not merely the original claim; it is "any" claim that may be brought forward in the matter; that is to say,

any claim as regards the "cause or matter" pending. A cause is still pending even though there has been final judgment given, and the Court has very large powers in dealing with a judgment until it is fully satisfied. It may stay proceedings on the judgment, either wholly or partially, and the cause is still pending, therefore, for this purpose, as it appears to me, and must be considered as pending, although there may have been final judgment given in the action, provided that judgment has not been satisfied. And, indeed, an interpretation has been put by the Court on the word "proceedings" in sub-sect. 5 of the same section with regard to "a stay of proceedings in any cause or matter pending," namely, that that must, of course, be construed to mean a stay of execution on a judgment, although that judgment might not be satisfied; so that the party must apply in the cause or matter pending, and cannot bring a new action for the purpose. I think, therefore, that the words of the 7th sub-section are large enough to include the case before me.

The case before me is simply this. It is an action for a money demand, in which the plaintiff asks a Court of Justice to compel the defendant, by means of legal process, to pay what is due to him. That is the meaning of the action. The plaintiff comes to the Court for no other purpose than to ask the Court to use that constraint which the law can impose upon the defendant to compel payment to the plaintiff of his money demand. The question in dispute in such an action may sometimes be the amount due, but it more often is the mode of obtaining payment. That being so, the Court gives judgment against the defendant, by which it declares and ascertains the amount due, and orders the defendant to pay it. The defendant disobeys the order of the Court, and then the Court is asked to compel him to pay; and the only mode which, as a general rule, the law now recognises of compelling him to pay, is by taking away his property, realizing it, and applying the proceeds in payment of the plaintiff's demand. I leave out of consideration the exceptional case of attachment, because, as a general rule, that is not the mode necessary to be adopted. The mode I have stated of compelling payment, we call execution; it is the obtaining in some shape or other, by legal process, possession of the defendant's lands or goods, sell-

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ing them, paying the consequent expenses, and out of the proceeds paying the demand. This mode of enforcing payment seems to me to be plainly "a proceeding in the cause or matter"; and the claim brought forward by the plaintiff that he may be paid the amount of his demand out of the proceeds of the goods or lands of his debtor, when the possession of or title to those lands or goods is disputed, is certainly a "claim brought forward" —and I should say "properly brought forward"—"in the cause or matter." Then there were various modes of attaching the lands or goods of the defendant known to the law and within the jurisdiction of the Courts, which jurisdiction was amalgamated by the *Judicature Act* and made exerciseable by any single Court. One of the modes was by writ of *fieri facias:* another mode was by writ of *elegit:* a third mode was by the appointment of a receiver by the Court of Equity, when the other modes proved ineffectual by reason of the imperfection of the statutes which authorized the sheriff to deal with the property of the debtor. This mode of proceeding by the appointment of a receiver was called equitable execution. It was a mere mode of doing that which the plaintiff asks the Court in every action to do, namely, to realize the debtor's property so as to produce the sum demanded. Prior to the *Judicature Act*, the Courts of Equity, before granting equitable execution, required to be satisfied of two things, first, that the Plaintiff in the action had tried all he could to get satisfaction at law; and then that the debtor was possessed of that particular equitable interest which could not be attached at law. As a rule, your right to recover a money demand could only be fully recognised in a Court of Law. Most money demands were only cognizable there; and therefore, as a rule, when you had a mere money demand, you were compelled to bring an action in a Court of Common Law to recover it; and then, when you had got your judgment, you were compelled to bring a new action—then called a suit in Equity—by bill to enforce the judgment. Now that appears to me to be the very imperfection which the *Judicature Act* was intended to remedy: you were not to be obliged to go from one Court to another upon such a simple matter as the enforcement of a judgment, but—to quote the words of the 7th sub-section of the 24th section—the Court is to grant

all such remedies as the parties may be entitled to in the matter pending, "so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

The very object of transferring the jurisdiction to one Court was that it might do everything without the necessity of going to another Court; and that being so, where is the necessity of going to another Court, when you find that the Act itself not only prevents another Court interfering in the action after judgment, but drives you to apply to the Court in which the original action was brought, even though the ground of the application may be a subject of equity? Before the *Judicature Act*, if there was an equity which could only be brought before a Court of Equity, you could file a bill to restrain judgment, and that might have been done even after judgment recovered; but all that has been put an end to, and you must now go to the same Court to deal with the judgment. Upon the same principle you ought to go to the same Court to deal with its own judgment when you are not staying it, but seeking to carry it out and enforce it.

Upon the whole, I think that I should be deciding against what appears to me to be the plain view of the Act of Parliament were I to decide that the issuing of another writ was essential in order to obtain the full effect of a judgment of the Court which originally pronounced it.

Passing from that, I come now to another question, which is one of some singularity. The creditors in the action issued their writ of *elegit*, and they could get nothing by it, because the land in question was vested, as to the legal estate, in the mortgagee. Thereupon they applied to Mr. Justice *Stephen* in Chambers, sitting as a Judge of the Queen's Bench Division—in which the action was brought—for a receiver; the application being made upon an affidavit of facts. There can be no doubt that, before the *Judicature Act*, if the Plaintiffs had filed a bill stating those facts, they would have got their receiver; nor is it suggested that, except for this ceremony of issuing a writ between the same persons and asking for a receiver, there was anything that was wanting. But they only got this receiver about, but not earlier

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than, four o'clock on the afternoon of the 14th of September; and it is proved by affidavit that on the very same day, at a quarter to four o'clock, the *Huddersfield* County Court, which had jurisdiction over the matter, had made an order granting a receiver and manager; so that that order was quite complete about a quarter of an hour before the order of Mr. Justice *Stephen* was made, and the debtor was liable to be committed, if he interfered with the receiver appointed under that order, he having committed an act of bankruptcy on the previous day, the 13th of September; and therefore there was ample jurisdiction in the County Court of *Huddersfield* to grant the order appointing this receiver. What, then, was the effect of the receivership so created by the County Court? It appears to me it gave that receiver a legal right against everybody except the mortgagees, who were in actual possession. If Mr. Justice *Stephen* had been made aware, at four o'clock on that day, that a receiver had been appointed at a quarter to four on the same day by the County Court of *Huddersfield*, that Court having jurisdiction to make the order, he would have been bound to refuse, and would have refused, to make the order he did: he could not have made an order for a receiver to interfere with the receiver of the Court of Bankruptcy: the order would not have had any effect whatever. A receiver was sometimes appointed by the Court of Chancery, and I suppose may still be appointed by the Chancery Division, not to act until some other receiver, who had been appointed in some other proceeding, was discharged. That might perhaps have been done in this case, and that would still have been equitable execution in the way of seizing the property. Still nothing of the kind was done, and Mr. Justice *Stephen's* order was properly made on the information before him, because it saved the rights of the prior incumbrancers. That being so, if the bankruptcy proceedings had gone on, there could, in my opinion, have been no question at all. The bankruptcy receiver was in possession, and properly in possession, before the appointment of a receiver in the action; and it is impossible, therefore, that the receiver in the action could have got possession under Mr. Justice *Stephen's* order, or that it could have amounted to an equitable execution against the receiver in bankruptcy.

But what occurred was this: the bankruptcy went on up to a

certain point, but on the 24th of September the bankruptcy proceedings were turned into a liquidation. I may say here that it appears in evidence—though I do not think anything material turns upon it—that the receiver of the Plaintiffs gave notice to the mortgagees a few days after his appointment, but before the 24th of September, and that the mortgagees afterwards sold the property and out of the proceeds paid themselves. They have a surplus, and the contest before me is as to that surplus. It is the fact that neither of the receivers got any rents. Then, on the 25th of September, the bankruptcy proceedings having been turned into proceedings for liquidation by arrangement, the same man—though I do not think anything turns upon that—is made receiver in the liquidation as was receiver in the bankruptcy. The trustees are appointed, and the proceedings for liquidation by arrangement are completed, so that the bankruptcy proceedings have come to an end.

It is suggested on the part of the Plaintiffs in the action that the effect of those liquidation proceedings was to destroy the appointment of the receiver in the bankruptcy, so far as that receiver would intercept the rights of the Plaintiffs, and it is said that that was equivalent to a discontinuance of the bankruptcy proceedings and a discharge of the receiver *ab initio*. In order to try that question, one must ascertain for whom the bankruptcy receiver would have received under the existing circumstances. The bankruptcy receiver was not appointed until the 14th of September. There was an act of bankruptcy committed by the debtor on the 13th of September, and the title of the trustee under the liquidation proceedings therefore related back to the 13th of September, and he would consequently be entitled to take from the bankruptcy receiver anything he received, or might have received, from and after that date. Can it be possibly said that the jurisdiction in bankruptcy is so absurd that, when a receiver has been appointed in the proceedings in bankruptcy to protect the property of the debtor for the creditors, and those proceedings are turned into liquidation proceedings giving a title to the trustees to the very property so protected, that is to operate, not as a discharge of the receiver from the time the trustees were appointed—as it does—but as a discharge of that

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receiver *ab initio*, so that the property which he was appointed to preserve shall not pass to the creditors whose title was intended to be protected and maintained by that very appointment? Independently of the rule in bankruptcy which says that the Court may adopt the bankruptcy proceedings—and of course it may—I think that the very facts themselves shew an adoption. The moment the receiver is discharged he has to pass his accounts to the Court which appointed him, and that assumes that he is to pay the balance to the person to whom it belongs. If he had received the money from the mortgagees under the notice to them, it would have belonged to the trustees in the liquidation: he would have passed his accounts in the bankruptcy, and would have paid over the balance to them. Can it be said that by the mere fact that the sale did not take place till subsequently the rights of the parties changed, and that the right of the receiver in bankruptcy therefore ceased? I should be casting ridicule upon the procedure in bankruptcy if I were to so decide. I think, therefore, it must be held that the receivership in bankruptcy was still a good receivership until the receiver was discharged, and that all the property of which he took actual or legal possession, or such possession as he could obtain as he did by the simple notice to the mortgagees to pay, would be received by him and held by him for the benefit of the person entitled to those proceeds—in this case the trustees. Consequently the trustees must be held to be entitled to the surplus moneys in question.

C. A.

The Plaintiffs appealed. The appeal came on for hearing on the 18th of December.

Winslow, Q.C., and *Fooks*, for the Appellants:—

The appointment of a receiver on the application of the Plaintiffs was a good equitable delivery in execution: *Hatton* v. *Haywood* (1); *Anglo-Italian Bank* v. *Davies* (2); *Ex parte Evans* (3). Now, before delivery in execution there must have been a seizure in fact or in law. There is, therefore, a seizure in law by the

(1) Law Rep. 9 Ch. 229. (2) 9 Ch. D. 275.
(3) 13 Ch. D. 252.

appointment of a receiver. Under an extent, there is a seizure in law by the finding of the jury. *Atkinson* on Sheriffs (1). Under sect. 95, sub-sect. 2, of the *Bankruptcy Act*, 1868, our equitable seizure, therefore, is good, the Plaintiffs not having had any notice of a prior act of bankruptcy, and the Plaintiffs are entitled to the benefit of sect. 12, and to have such an order made as they ask.

[JAMES, L.J.:—In Chancery, when a receiver had been appointed, though he was not actually in possession, a third person could not interfere with the property. How could you take in execution property which was in the hands of the Court of Bankruptcy?

COTTON, L.J.:—I do not see why your receiver is to take precedence over the bankruptcy receiver, whose appointment was prior in time.]

Macnaghten, Q.C., and *Oswald, contrà*, were not called upon.

JAMES, L.J.:—

I am of opinion that the decision of the Master of the Rolls was right. The question is whether a receiver appointed on the application of an execution creditor can lawfully seize property of which the Court of Bankruptcy has taken possession by the appointment of a receiver. The main object of appointing a receiver in bankruptcy is to protect the assets from execution creditors. The 95th section of the *Bankruptcy Act*, 1869, sub-sect. 2, when it speaks of an execution executed by seizure before the date of adjudication, must be taken as speaking only of an execution lawfully executed by lawful seizure; and a seizure by the sheriff after the Court of Bankruptcy has taken possession of the property by appointing a receiver is not a lawful seizure.

COTTON, L.J.:—

The execution creditors, on the 14th of September, got an order for a receiver of the rents and profits of the debtor's leasehold property, which was subject to mortgages. This, if there had been nothing more in the case, would have been a good

(1) 5th Ed. p. 251.

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equitable execution, but at an earlier hour on the same day the Court of Bankruptcy had appointed a receiver. The object of appointing such a receiver is to keep out execution creditors, and his holding the property prevented the execution creditors from getting what they would otherwise have got. I can see no reason for postponing the receiver appointed by the Court of Bankruptcy to the receiver appointed at the instance of the execution creditor. The receiver of the Court of Bankruptcy had legal though not actual possession from the moment of his appointment, and the property being thus in the hands of the Court of Bankruptcy, the subsequent equitable execution was ineffectual. I am of opinion that the decision is right.

LUSH, L.J.:—

I am of the same opinion. The object of appointing a receiver in bankruptcy is to protect the property for the benefit of the creditors in case the proceedings should terminate in bankruptcy. The second clause of sect. 95 of the Act must be read in connection with the other parts of the Act, and must be taken to proceed on the assumption that the Court of Bankruptcy has not got possession of the property. Here the property was already in the hands of the Court, and the equitable execution cannot affect it.

Solicitors: *Stevens & Co.; Layton & Jaques.*

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1881
Feb. 5, 14.

[1879 H. 403.]

Practice—Abandoned Motion—Discontinuance of Action—Costs—Taxation—Incomplete Affidavits or Pleadings.

Statement of practice as to taxation of costs of an abandoned motion, or on discontinuance of action.

THE Plaintiff, having served the Defendants with a notice of motion for an injunction, afterwards gave them notice of abandonment, whereupon an order was made directing the Plaintiff to pay the Defendants' taxed costs of the motion.

Questions arose in taxation as to the costs of preparing affidavits which had not been filed at the date of abandonment.

The Plaintiff applied by summons to review the taxation.

Upon the summons—which was adjourned into Court—coming on for hearing, it was stated that there appeared to be no distinct authority as to what was the usual practice of the Taxing Masters' office in such cases; but it was suggested by the Plaintiff's counsel that by analogy to the practice which, it was said, had been usually adopted on discontinuance of action or dismissal of bill, the costs in question ought not to be allowed.

His Lordship then directed that the summons should stand over, in order that he might have a certificate from the Taxing Masters upon the following questions of practice: 1. Whether, on taxing the costs of an abandoned motion, it is usual to allow the costs of preparing, and briefing, or otherwise relating to, affidavits which have not been actually sworn, or, being sworn, have not been filed; 2. Whether, in taxing costs, on discontinuance of action, any change of practice has been made from the former practice before the *Judicature Act* on dismissal of bill; and, in particular, with respect to pleadings and evidence, &c., in course of preparation.

In reply to these questions the Taxing Masters certified as follows:—

"That we have always acted upon the principle that the costs

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of all work in preparing, briefing, or otherwise relating to affidavits or pleadings, reasonably and properly and not prematurely done, down to the time of any notice which stops the work, is allowable and that the Taxing Master, having regard to the circumstances of each case, must decide whether the work was reasonable and proper and the time for doing it had arrived. We apply the same principle in taxing costs on discontinuance of action or dismissal of bill, and we have not made any change of practice in this respect since the *Judicature Act*."

Grosvenor Woods, for the Plaintiff.

Methold, for the Defendants.

Upon the summons being mentioned on a subsequent day,

HIS LORDSHIP, having read the Taxing Masters' certificate, refused the application with costs.

Solicitors: *R. Hewlett; Blachford, Riches, & Co.*

V.-C. M.
1880
Dec. 14, 15.

In re BARTLETT.
NEWMAN *v.* HOOK.

[1879 B. 499.]

Sale by the Court—30 & 31 Vict. c. 48, s. 7—Opening Biddings—Principle applicable to Private Contract.

In an administration suit an estate was ordered to be sold by auction, but the reserved price not having been reached the sale by auction became inoperative. A subsequent offer to purchase subject to the approval of the Court within ten days was carried in before the Chief Clerk, who approved of the offer, and ordered the contract to be carried out, whereupon the deposit was paid and the abstract delivered. Before the order had been passed and entered a much higher price was offered.

Upon summons to vary the Chief Clerk's certificate by setting aside the sale and directing the offer for a larger amount to be accepted :—

Held, that the certificate of the Chief Clerk, although not passed and entered, was tantamount to a confirmation of the contract; and that the principle of the Act 30 & 31 Vict. c. 48, s. 7, by which the old practice of opening biddings on a sale by auction was discontinued, except upon the ground of fraud or improper conduct, applied equally to a sale by private contract entered into under the sanction of the Court, and that such a contract could not be discharged where no unfairness existed. The Chief Clerk's certificate was therefore confirmed.

THIS was a summons to vary the Chief Clerk's certificate confirming the sale of an estate, and for an order that the sale should be set aside and an offer for a larger amount be accepted.

The action was brought for the administration of the estate of *George Bartlett*, and in the course of administration it became necessary to sell an estate called *Highfield House, Winchmore Hill*. Proceedings were taken in Chambers and the conditions of sale were settled by the conveyancing counsel. The sale was appointed to take place by auction on the 5th of August, 1880, under the direction of Mr. *Beadel* as the auctioneer, and the reserved bidding was fixed by the Chief Clerk, upon the usual evidence of surveyors, at the sum of £18,500. The sale took place on the day named, when the highest bidding, which was made by Mr. *Alfred Walker*, amounted only to £15,700, and consequently the estate was not sold. Mr. *Walker* subsequently made an offer in writing to the auctioneer to give £18,000 for the property, subject to the sanction

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of the Court being obtained within ten days, and this offer having been communicated to the trustees, a conditional contract, dated the 20th of September, was entered into by the auctioneer on behalf of the parties interested with Mr. *Walker*, and a summons to confirm the contract was taken out before the Chief Clerk for the 24th of September, when the parties interested in the sale attended before the Chief Clerk. Upon that occasion objections were raised to the contract being confirmed, by Mr. *Aird*, the solicitor for parties entitled to three-fourths of the estate, of whom some were infants, and one was the Defendant Miss *Hook*, who was also co-trustee with the Plaintiff under the will. The grounds of Mr. *Aird's* objections were that the sale by auction had not been well or sufficiently advertised, and that the property was worth more than £18,000, and he told the Chief Clerk that he thought he could get a purchaser at a much larger sum, actually naming £20,000. He therefore urged the Chief Clerk to postpone the confirmation of the contract for a fortnight, and this the Chief Clerk was willing to do, but it having been brought to his notice that the ten days stipulated for by the contract with Mr. *Walker* would expire on the 30th of September, the summons was adjourned to the 29th. Mr. *Aird* upon that occasion again urged postponement, and stated that he was then in negotiation with an intending purchaser, but the Chief Clerk refused to delay the completion of the sale, and thereupon confirmed the contract with Mr. *Walker*, and signed a certificate to that effect. The deposit of £1800 which was to be paid by *Walker* upon the confirmation of the contract was paid by him on the following day, and the abstract of title was delivered.

In support of the present application for an order that the sale should be set aside and that the increased offer should be accepted, an affidavit was filed by *Henry Aird* "that he had received a *bonâ fide* offer in writing by a most respectable person to purchase the property for £20,000; the terms of the contract to be approved by his solicitor." The letter from the intending purchaser, dated the 11th of October, was set out in the affidavit, but without a name. The name of the proposed purchaser was stated in Court to be a Mr. *Mainprice*.

There was also an affidavit by a land valuer, who stated that in

his opinion the property, if sold in its present state, would fetch £26,000, or if divided into lots and sold for building purposes it would realize as much as £36,000.

On the other hand, Mr. *Beadel*, the auctioneer appointed to sell the property, had made an affidavit stating that in his opinion £18,000 was a fair value, and more than would probably be obtained if the property were again put up to auction. And Mr. *Walker*, with whom the existing contract for sale had been made, stated that in order to provide the £18,000 for the purchase, he had entered into a contract to sell certain freehold property at *Woolwich* and other securities, by which he would lose several hundred pounds in case the Court refused to allow this contract to be carried out.

Glasse, Q.C., and *Anderson*, in support of the summons to vary:—

We have evidence that this estate is worth more than £18,000, and we say that if it had been properly advertised there would have been a different result at the sale by auction. We have now a decisive offer of £20,000, and the question is whether the interests of the persons beneficially entitled, some of whom are infants, are to be sacrificed owing to the improper haste with which the matter has been carried through. This is not a sale by auction within the meaning of the 7th section of the Act 30 & 31 Vict. c. 48 as to opening the biddings. This is a sale by private contract under the sanction of the Court, which, by express stipulation, was not to be carried out unless with the approval of the Court. It has not yet been approved by the Court.

[They cited *Millican* v. *Vanderplank* (1); *Osborne* v. *Foreman* (2), and *In re Tunisian Railway Company*, before Vice-Chancellor *Malins* in June, 1880, and before the Court of Appeal on the 12th of June, 1880.]

Everitt appeared for a person entitled to one-fourth of the property.

Higgins, Q.C., and *Dobbs*, for the Plaintiff, a trustee under the will, who approved of the contract with *Walker*.

(1) 11 Hare, 136. (2) 8 D. M. & G. 122.

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J. Pearson, Q.C., and *Robson*, for *Walker*, the purchaser:—

The justice of this case is entirely in favour of Mr. *Walker*. It was to prevent the playing fast and loose with a purchaser that the Act of 30 & 31 Vict. c. 48 was passed. We contend that the principle of that Act is just as applicable to a sale by private contract under the sanction of the Court as to a sale by auction, and a purchaser cannot now be disturbed in his right to the confirmation of his contract.

In this case the Chief Clerk actually made an order on the 29th of September confirming Mr. *Walker's* contract, although the form of passing and entering the order was not completed.

The cases which have been cited are only applicable to the old rule as to opening biddings, but in *Osborne* v. *Foreman* (1), and *Barlow* v. *Osborne* (2), which was the same case on appeal to the House of Lords, it was laid down that opening the biddings was not applicable to a sale by private contract. As to the pretence that the sale was not properly advertised, we have evidence to the contrary shewing that it was advertised forty-three times in the public journals, besides being made public by numerous posters affixed up in the neighbourhood of the estate.

Glasse, in reply.

MALINS, V.C.:—

This case involves very important considerations as to the practice with reference to sales under decrees of the Court. It appears that this property, called *Highfield House*, was ordered to be sold in the course of administering the estate of Mr. *George Bartlett*, and the conditions of sale were settled by the conveyancing counsel, and the lowest price or reserved bidding was fixed upon the evidence of surveyors. Before the sale took place there was the selection of Mr. *Beadel* to be the auctioneer in the usual course, and advertisements were prepared offering the property for sale on the 5th of August, with a reserved price of £18,500. I am satisfied from the evidence that every publicity was given by numerous advertisements and posters of the intended sale, which took place on the day named, but there was no person

(1) 8 D. M. & G. 122. (2) 6 H. L. C. 556.

who bid higher than Mr. *Walker*, who bid £15,700, and he now claims to be a purchaser by private contract for £18,000. So that between the day of the auction and the 20th of September he had increased his offer by £2300. It is evident that before the sale a very exaggerated estimate was formed of the value of the property, and in the face of much contradictory evidence the Chief Clerk was asked to fix the reserved price. These matters, I may say, are, with very few exceptions, decided upon by the Chief Clerk, and I recollect only one case which was ever brought before me personally. However, when the present case came before the Chief Clerk, although there was an affidavit by Mr. *Tolley*, dated the 29th of May, which was used upon that application, who estimated the property, if sold for building purposes, as being worth £36,000, nevertheless the Chief Clerk, in pursuance of his duty, and with the sanction of all the parties interested, who were before him, fixed the reserve price at £18,500; and that he exercised a sound discretion in not fixing it higher was clearly shewn by the fact that no person was found to bid higher at the auction than £15,700. I say this was done with the approbation of all parties, because if Mr. *Aird* had been dissatisfied with the conclusion arrived at by the Chief Clerk he might at once have brought the matter before me either in Chambers or by adjournment into Court; but he did neither, and I must conclude that the reserved price was fixed with the concurrence of the trustees for sale and of the other parties interested. The trustee, against whose conduct no charge whatever is made, had the conduct of the sale, and he and the auctioneer, Mr. *Beadel*, I am satisfied, did all they could for the benefit of the estate, but the sale took place and nothing resulted from it. Then, after the sale, Mr. *Beadel*, having still authority for the purpose, thought it expedient that the offer of Mr. *Walker* for £18,000 should be accepted, and he informed the Plaintiff of his opinion. Several communications took place, and, finally, in a letter from Mr. *Beadel*, on the 30th of August, he pointed out that by delay the offer of Mr. *Walker* might be lost. That letter was forwarded to Mr. *Aird* on the 31st, at a time when he was absent from his office, it being during the Long Vacation, but his business was conducted by his managing clerk, which amounts to the same thing as notice to him. When he

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returned, it appeared that he had no one to propose as a purchaser who would give more than Mr. *Walker*, although he was strongly of opinion that the property was worth more. Upon that Mr. *Beadel* was authorized to enter into the contract. It is clear that the Plaintiff was acting *bonâ fide* in the belief that the £18,000 was a fair and proper price, and it is also clear that Mr. *Beadel*, who was a man well capable of forming an opinion as to the value, and who had no personal interest in recommending the sale at that price, also thought it desirable to secure Mr. *Walker* as a purchaser; therefore the Plaintiff, who was the person to conduct the sale, and the auctioneer appointed by the Court, acting to the best of his opinion, were agreed in thinking that the offer should be accepted without delay for £18,000. Accordingly the contract was entered into, and upon this the Chief Clerk was asked on the 20th of September to confirm the sale. Now the offer made by Mr. *Walker* had this stipulation, that it should be subject to the approval of the Court within ten days, and, as the sale was made under the direction of the Court, it was quite proper to stipulate that the offer should not be binding unless sanctioned by the Court. It has been argued that the period of ten days was an unreasonable time, but I do not think it was so, and it seems to me to be very natural that a purchaser should be desirous of knowing as early as possible whether he is to have the estate or not. I think ten days was quite sufficient time, since the Court is always sitting, and sales of this nature can be effected as well during the long vacation as at any other time. Then, with this condition affixed to the offer, the matter was taken before the Chief Clerk, and was argued by both sides. Mr. *Aird* seems still to have been under the impression that he could get more than £18,000 for the estate. What he says in his affidavit is that he told the Chief Clerk, Mr. *Rawlinson*, "he thought he could get a purchaser at a much larger sum than £18,000, actually naming £20,000," and urged the Chief Clerk that the matter should be postponed for fourteen days. The Chief Clerk at first decided upon adjourning it for that period, but the vendor's solicitor called his attention to the fact that fourteen days would exceed the time fixed by the contract, which was ten days from the 20th of September, and therefore, if

he adjourned the matter for fourteen days, the purchaser, *Walker*, might get off his bargain. In consideration of that suggestion the Chief Clerk thought he could not adjourn it beyond the 29th, and that day was accordingly fixed for the final settlement. That brings it down to the end of September, so that Mr. *Aird*, having had, from the 5th of August to the 29th of September, the opportunity of finding another purchaser, was still unable to do so. While the matter was before Mr. *Rawlinson* Mr. *Aird* made no other statement than that he thought he should be able to get a better offer, but he did not say that he had an offer from any one. Many men think they can get a better price, but often fail in their expectations. But what was the use of saying he thought he could get a better offer and naming £20,000, unless he had some one ready who would give that price? Then it seems Mr. *Rawlinson's* period for attendance during the vacation came to an end, and he was succeeded by Mr. *Walker*, who was the Chief Clerk in Chambers, on the 29th, to which day the matter was adjourned. On that occasion Mr. *Aird* says he informed the Chief Clerk that he was then in negotiation with an intending purchaser, and pressed for a further adjournment, but Mr. *Walker* refused the adjournment. Now what could Mr. *Walker* have done? Here was a binding contract for £18,000. Was he to let the purchaser go, on the mere speculation that some one else might be found? If Mr. *Aird* had said on the 29th, Here is a man who will bind himself to give £20,000, or any higher price, it might have been right to allow a further adjournment; but he did nothing of the kind, and I think the Chief Clerk acted perfectly right in confirming the contract. Then this summons was taken out on the 8th of October, and Mr. *Glasse* says there has still been no confirmation of the contract, and on the 13th of October Mr. *Aird* makes an affidavit, in which he says, "I have received a *bonâ fide* offer in writing by a most respectable person, to purchase the property for £20,000," and he sets out a letter from a person without any signature, in which the sum of £20,000 is offered, with this proviso, "the terms of the contract to be approved by my solicitor." Even that is not a definite contract, for who can tell what terms his solicitor may approve? Then the matter was brought before Mr. Justice *Field* during the vacation. Here was a matter which was

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evidently not an easy one, or one that could be disposed of at once, as it has now occupied nearly a whole day. Mr. Justice *Field* did quite right in saying that it must go before the Vice-Chancellor. Mr. *Glasse* urged that there was no confirmation of the contract, because the order was not passed and entered. I dissent from that view, and I am of opinion that the confirmation took place when the Chief Clerk decided upon making the order confirming the contract. The real point I have to decide is what ought the Chief Clerk to have done on the 29th of September. It was not certain at that time that *Mainprice* would have come forward, and in that case Mr. *Walker's* offer might have been lost. What should I have done under such circumstances? Finding there was one man who had paid a deposit and bound himself to complete the contract, unquestionably I should not have let him go, on a speculation that some one else might come forward, because Mr. *Aird*, who had had all this time, from the 5th of August up to the 29th of September, had not then brought forward another purchaser who would pay a higher price, and there never was found any one till the 11th of October who would give more than £18,000.

I think, therefore, that the Chief Clerk was perfectly right in doing what I should have done myself if I had been asked to confirm the contract. He did quite right not to refrain from confirming the contract upon a mere speculation as to a possible purchaser, when no one knew who that purchaser was, for it appears that the name of *Mainprice* was never even mentioned until to-day. It would have been most dangerous to have acted upon such a principle.

But over and above all this, we have the Act of 30 & 31 Vict. c. 48. We know that before 1866, if there had been a sale by auction under the direction of the Court—if *Walker* had bid £18,000, and *Mainprice* had come forward afterwards and offered an increased price of £2000, the mere circumstance that a man had offered that sum would have been sufficient to cause the biddings to be opened. That was a most pernicious practice. It was unfair to purchasers and most prejudicial to vendors. Now, although this was not a sale by auction, I think the principle of the statute is clearly applicable to a sale by private contract

entered into under the sanction of the Court of Chancery, and that a contract by the Court when once entered into is not to be discharged unless under the most special circumstances—such as are specified in the Act of Parliament. The 7th section of the Act provides that the practice of opening the biddings on any sale by auction of land under or by virtue of any Order of the Court of Chancery shall be discontinued; and the highest *bonâ fide* bidder at such sale, provided he shall have bid a sum equal to or higher than the reserved price (if any), shall be declared the purchaser, unless the Court or Judge shall, on the ground of fraud or improper conduct in the management of the sale, upon the application of any person interested in the land (such application to be made to the Court or Judge before the Chief Clerk's certificate of the result of the sale shall have become binding), either open the biddings or order the land to be resold.

Now the *Tunisian Railway Company's* case has been referred to. That was a case in which a contract was entered into for the sale of the *Tunis Railway* for £105,000 to a French company, subject to the approval of the Court. It came before me on a petition to confirm the sale. I thought the *Tunis Company*, by their directors, had bound themselves in honour, if not in law, to sell to the *Rubattino Company*. I said nothing should induce me to confirm that contract for sale, which I thought had been most unfairly entered into, and the Court of Appeal affirmed my decision. In the result, the company got £60,000 additional price for the railway. The reason I refused to confirm the sale was because I thought there had been unfairness; but here there has been perfect fairness in the conduct of all the parties. Many estates are sold like this, in which the parties afterwards say, What a pity it is we did not sell it to such a person who would have given a higher price. But is a transaction to be undone because the parties find that they might have got more money? Where was *Mainprice* during all this time? he was a client of Mr. *Aird's*, and might have come forward at an earlier period, but, though it was said that he lived in the neighbourhood of the property, and must have known it was for sale, he never even attended the sale, which was advertised very extensively.

Most of the cases cited were cases in which the biddings were

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opened. The decision in *Osborne* v. *Foreman* (1) was within the rules of the Court at that time. There the sale took place under a decree by tender, subject to the contract receiving the sanction of the Judge. The appellant was certified by the Chief Clerk to be the purchaser. A summons was then taken out by the respondent, seeking to open the biddings and offering an advance, and that summons was the next day served on the appellant. The Chief Clerk's certificate was signed the same day by the Judge, and it was held that the Court was not precluded from opening the biddings and reselling the property. In that case Lord Justice *Turner* did not differ from the rules laid down in *Millican* v. *Vanderplank* (2); and I think the very passage which was read from that case goes to shew that the Court will not interfere with a sale by private contract, and that the principles as to opening biddings have no application to private contracts when there has been no unfairness in the transaction. This is virtually an application for opening the biddings as Mr. *Glasse* said, and I am of opinion that I cannot interfere. What I say here is, that where there has been a sale by private contract under a decree of the Court, the principle of the Act of Parliament is applicable in the same way as on an application for opening biddings, and where a contract has been entered into and confirmed, I think this Court ought not to interfere. Upon this application it is only open to me to say whether the Chief Clerk was right in the decision he arrived at, and I am of opinion that he was perfectly right, and I confirm the sale accordingly. The purchaser will deduct his costs out of the purchase-money.

Solicitors: *Aird; Marchant, Purvis, & Benwell; Newman, Jeans, & Co.*

(1) 8 D. M. & G. 122. (2) 11 Hare, 136.

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[1879 J. 134.]

Officer's Commission—Charge—Notice—Priority—Regulation of the Forces Act, 1871 (34 & 35 *Vict. c.* 86), *s.* 3.

When an officer retires from Her Majesty's service, the amount in respect of his commission to which he is entitled under 34 & 35 Vict. c. 86, s. 3, "upon his retirement," though it has been previously lodged by the Army Purchase Commissioners with the army agents, and by them entered in their books under the officer's name, is not the money of the officer so as to be capable of being affected by notice from an incumbrancer to the army agents until the retirement is gazetted.

A first incumbrancer gave notice after the money was transferred by the Army Purchase Commissioners to the agents, and again gave notice five days after the *Gazette*. Second and third incumbrancers gave simultaneous notices on the day after the *Gazette*:—

Held, that the order of priorities was: 1. Second incumbrancer; 2. Third incumbrancer; 3. First incumbrancer.

THIS was an action to establish a charge in favour of the Plaintiff, in priority to the claims of other incumbrancers, on the commission money, in the hands of Messrs. *Cox & Co.*, army agents, due to an officer on his retirement from the army.

Shortly before the 27th of March, 1879, Captain *A. Munro Smith*, of the 38th Regiment, sent in his papers for retirement, and on the 27th of March the following letter was sent to Messrs. *Cox & Co.*, the army agents, by the secretary of the Army Purchase Commission:—

"I am directed by the Army Purchase Commissioners to forward a receipt which you are hereby authorized to fill up and draw upon the Paymaster-General for the sum of £800, being the amount due to Captain *Arthur Munro Smith* on his retirement. The receipt should be signed in the name advised, otherwise payment will be refused."

On the 29th of March *Cox & Co.*, in pursuance of this warrant, drew the sum of £800 from the Paymaster-General, and signed and sent to the Army Purchase Commissioners the receipt, which in the following form was annexed to the warrant:—

"Received of H. M. Paymaster-General on the 29th March,

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1879, the sum of £800, on account of Captain *Arthur Munro Smith.*

(Signed) "*Cox & Co.*"

The receipt of this money was entered in the account of the Army Purchase Commissioners in the books of *Cox & Co.*, and opposite was written, "for Captain *Smith.*"

On the evening of the 16th of May, 1879, the retirement of Captain *Smith* was published in the *Gazette.*

From the £800 the sum of £250 had been deducted by Messrs. *Cox & Co.* in order to provide for the regimental claims against Captain *Smith*, leaving a balance of £550 to meet incumbrances which amounted to £1086 11*s.*

The dates and particulars of the charges created by Captain *Smith* upon the commission money which he would be entitled to receive on his retirement from the army, and the dates of the notices given by the holders of these charges, were as follows:—

(1.) Messrs. *Price, Boustead, & Co.* (now represented by *A. Cooper* as their liquidation trustee), under a deed of the 5th of October, 1875, to secure £400 with interest. Notice of this charge was given to *Cox & Co.* by *Price & Co.* on the 8th of October, 1875; on the 29th of March, 1879, at 12.5, after *Cox & Co.* had received the £800 in respect of the commission; and again on the 21st of May, 1879 (five days after publication in the *Gazette* of Captain *Smith's* retirement).

(2.) *Thomas Kayler*, who held two charges of £240 and £204 created by letters signed by Captain *Smith* and dated the 14th of December, 1877, and the 5th of February, 1878. Notice of these charges was given by *Kayler* at 10 A.M. on the morning of the 17th of May, 1879, as soon as the office of Messrs. *Cox & Co.* was opened, and on every succeeding morning (Sundays and Bank Holidays excepted) until the 1st of September, 1879.

(3.) The Plaintiff *J. B. Johnstone*, who held a charge for £242 11*s.*, created by a letter signed by Captain *Smith* and dated the 14th of May, 1878. Notice of this charge was given by the Plaintiff to *Cox & Co.* on the 6th of June, 1878; on the 29th of March, 1879, at 11.55, and on every succeeding day (including two services on the 16th and 17th of May, as soon as the office of

Cox & Co. was opened in the morning, and again in the afternoon) down to the 28th of June, 1879.

In December, 1879, *Johnstone* commenced this action against Messrs. *Cox & Co.*, *Price, Boustead, & Co.*, *Kayler*, and Captain *Smith*, to establish his security and obtain payment out of the proceeds of the commission money in priority to the claims of the other incumbrancers, on the ground that he was the first to give notice of his charge on the 29th of March, 1879, on which day *Cox & Co.*, as he alleged, by receiving the £800 from Her Majesty's Paymaster-General, became trustees of that sum for the persons establishing their claims thereto.

It was stated in evidence that according to the practice of *Cox & Co.* it was not their custom to credit the retiring officer with the sum received by them as the value of his commission until the retirement was gazetted: "When an officer is gazetted out, and when we see his name in the *Gazette*, and we have the money, and there are no assignments, then we place the money to the officer's credit, less any regimental deductions. We never pay it out to the officer before he is gazetted."

The *Regulation of the Forces Act*, 1871 (34 & 35 Vict. c. 86), s. 3, provides that every officer "shall on his retirement be entitled in respect of such commission to receive, on application to the Commissioners, the price or sum thereinafter mentioned."

Sir *H. Jackson*, Q.C., and *Grosvenor Woods*, for the Plaintiff:—

On the 29th of March, 1879, when the £800, being the amount due to Captain *Smith* on his retirement, reached *Cox & Co.*, was acknowledged by them as received, and was entered in their books, and ear-marked as held for him, everything necessary had been done to make *Cox & Co.* stakeholders of the agreed and appropriated fund for Captain *Smith's* payment and bound by notice of incumbrances on the fund, although the right of Captain *Smith* to the actual receipt of the money may have been inchoate only until his retirement was published in the *Gazette*. Notice given to a trustee or stakeholder even before the fund actually reaches his hands will bind the fund: *Buller* v. *Plunkett* (1): *Somerset* v. *Cox* (2). In this case the Plaintiff, having been the first to give

(1) 1 J. & H. 441. 7 Jun 1861 (2) 33 Beav. 634. 10 Jun 1865

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notice on the 29th of March, the day on which the money was appropriated to meet Captain *Smith's* claim, is entitled to the first charge upon the fund: *Addison* v. *Cox* (1).

Horton Smith, Q.C., and *Romer*, for *Price, Boustead, & Co.* :—

We adopt the Plaintiff's argument that the 29th of March is the critical day on which notice could effectually be given. Our notice, given on that day within half an hour of that given by the Plaintiff, must be considered to all intents and purposes as a notice received at the same time, and our incumbrance, being prior in point of date, must therefore rank first: *Calisher* v. *Forbes* (2).

Hemming, Q.C., and *Jason Smith*, for *Kayler* :—

Cox & Co. did not become trustees of the money already in their hands for incumbrancers on the fund giving notice of their charge, until it became their duty to carry out the distribution of the fund, that is to say, until notice appeared in the *Gazette* of the retirement of the officer: *Earl of Suffolk* v. *Cox* (3). Up to that time the money was held by them as money of the Commissioners, ear-marked and intended to meet the contemplated liability, but was not money, which Captain *Smith* could obtain, or money under his control, so as to be affected by notice given by his incumbrancers. The 17th of May was the earliest day on which notice could effectually be given, and as simultaneous notices were given by the Plaintiff and *Kayler* on the morning of that day, *Kayler's* charge being prior in date must prevail.

Grosvenor Woods, in reply :—

Even though the right of Captain *Smith* to receive the money was inchoate only until the publication of his retirement in the *Gazette*, *Cox & Co.* were, for the purpose of receiving notices, trustees from the time of receiving the money from the Commissioners. Assuming, then, that according to *Somerset* v. *Cox* (4) the 29th of March was the critical day, the Plaintiff, who was first to give notice on that day, is entitled to priority. *Calisher* v.

(1) Law Rep. 8 Ch. 76.
(2) Ibid. 7 Ch. 109.
(3) 15 W. R. 732.
(4) 33 Beav. 634.

Forbes (1) does not help *Price & Co.* When there are conflicting rights between subject and subject, for the determination of which it is necessary to ascertain the actual priority, the law will take notice of the fractions of a day: *Tomlinson* v. *Bullock* (2).

BACON, V.C.:—

There can be no doubt that the law does occasionally take notice of portions of a day, and particularly in the case of notice by incumbrancers to a trustee or stakeholder. But in the present case that is a matter of no importance. The Plaintiff contends that the limit of time which I am to consider is the 29th of March, 1879, on which day the sum of £800 was actually due to the officer; and the Plaintiff rests his claim to priority on what he says was decided in *Addison* v. *Cox* (3). That case does not, however, in my opinion, apply to the case before me. When the transaction between the War Office authorities and the officer was finally completed, the money was payable, but not till then. Here the officer sent in his papers, and his retirement was accepted. The £800, the value of his commission, was paid on the 29th of March to Messrs. *Cox & Co.*, and the receipt for this sum was filled up in due form. The words of the warrant say that this sum was "due to Captain *Smith* on his retirement." What do those words mean? On the 29th of March he had not retired; he was at that moment one of Her Majesty's officers liable to military duties, and receiving his pay up to the 16th of May, when his retirement appeared in the *Gazette*. That being so, what meaning can I attribute to the words "on his retirement," except "when he shall have in fact retired." The practice at Messrs. *Cox's* is consistent with this. They enter in their books the fact that they have received £800, and they couple with this entry the name of Captain *Smith* for the purpose of ear-marking the fund. It was a necessary entry, and does not change the nature of the transaction. I therefore attach no importance to these words or to those of the receipt—"Received the sum of £800 on account of Captain *Smith*."

The money was held by Messrs. *Cox & Co.* on deposit to the

(1) Law Rep. 7 Ch. 109. (2) 4 Q. B. D. 230, 232.
(3) Law Rep. 8 Ch. 76.

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credit of the Army Purchase Commissioners until the retirement of the officer should be notified; thus it is equivalent to their having put the money into a box and labelled it, "For Captain *Smith* when he retires." Notwithstanding therefore *Addison* v. *Cox* (1), I cannot hesitate to say that the money remained the property of the Army Purchase Commissioners, and no less their property because it had been put into the hands of their agents, *Cox & Co.*, until the time that Captain *Smith's* retirement should appear in the *Gazette;* and until that time Captain *Smith* could not have drawn upon it. On the 16th of May, but after business hours at *Cox & Co.'s*, Captain *Smith's* retirement appeared in the *Gazette.* On the 17th of May simultaneous notices from *Johnstone* and *Kayler* were served on Messrs. *Cox*, and until the *Gazette* had appeared it cannot be said that there was any money due to Captain *Smith*, or any debt from the Commissioners or *Cox & Co.*, which any creditor of his could have charged. Upon the facts as proved before me, the £800 was money belonging to the Commissioners until the *Gazette* appeared, and therefore no notice given before the 17th of May could affect it, and the notices of the 17th of May being simultaneous, the elder must be preferred to the younger security. The notices given by the Plaintiff before the retirement was gazetted were wholly inoperative, and he is only entitled subject to *Kayler's* security.

The fund must be cleared by first paying the costs of all parties, and what remains must go to the incumbrancers in the order of their priorities, *i.e.*, 1. to *Kayler*, 2. to Plaintiff, 3. to *Price, Boustead, & Co.*

Solicitors: *Dod & Longstaffe; Fladgate, Smith, & Fladgate; S. Scott; Hollams, Son, & Coward.*

(1) Law Rep. 8 Ch. 76.

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V.-C. B.

[1880 J. 11.]

1880

Dec. 21.

1881

Jan. 11, 12

Administrator—Breach of Trust—Notice.

A., *B.*, and *C.*, as the only next of kin with *D.*, the administrator, of their intestate father, signed a memorandum in 1872 authorizing *D.* to borrow, upon mortgage or otherwise as he might deem best, upon the security of certain house property, held by the intestate under an agreement for a lease to be granted on completion of repairs, such money as *D.* required for carrying out these matters, and to charge their respective shares with the interest.

A lease of the houses was soon afterwards granted to *D.* as the sole legal personal representative of the intestate, which, with the memorandum, was shortly afterwards deposited by *D.* as a security for his own debt with *E.*

In 1875 the administration accounts, shewing a balance due to *D.*, were settled between *A.*, *B.*, *C.*, and *D.*, and *D.* then told *A.*, *B.*, and *C.* that he had not borrowed any money upon the security of their shares under the memorandum of 1872.

In 1877 *D.*, who had previously mortgaged his share of the house property to *E.*, executed a further mortgage to him of the entirety, reciting the authority of 1872. No notice was given by *E.* to *A.*, *B.*, and *C.*, that he held any charge upon their shares under the memorandum:—

Held, that, in the absence of any notice by *E.* to *A.*, *B.*, and *C.* of a charge to him of their shares by *D.* under the authority of 1872, the mortgage of 1877, after that authority had been withdrawn by the settlement of accounts, did not affect their shares, and that they were entitled to an assignment from *E.* of their shares of the property comprised in the lease, which had been mortgaged by *D.*

THE three Plaintiffs in this action were the daughters of *James Jones*, who died intestate in January, 1872.

Before and at the time of his death the intestate was entitled to the benefit of an agreement for a lease of houses in the City on his completing the rebuilding and necessary repairs. These repairs were attended to by his son, the Defendant *Frederick Jones*, who, on the 26th of March, 1872, took out administration to the intestate. The Plaintiffs had during their father's lifetime advanced £400 cash out of their own moneys at the request of their brother *F. Jones*, to enable him to complete the buildings and take up the lease. On the 11th of May, 1872, on their brother's representation that a further sum of £400, of which they would have

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to contribute three-fourths, would be required to cover his outlay and liabilities in respect of the building and of the intestate's estate, the Plaintiffs, on the faith of an assurance that no further contribution would be required from them, signed the following authority to their brother, the Defendant *F. Jones*:—

"In consideration of the outlay and liabilities you have incurred in connexion with the estate of our father, the late Mr. *James Jones* of , we, the undersigned, being with yourself the only next of kin, do hereby request and authorize you to borrow upon mortgage, or otherwise as you may deem best, upon the security of the houses Nos. 28—30, *Lawrence Lane*, and No. 10, *Trump Street*, held under an agreement for a lease from Miss *M. J. Sayer*, such money as you require for carrying out these matters, and to charge our respective shares with the interest thereof.

"*E. E. Jones.*
"*Georgiana Jones.*
"*A. E. Jones.*"

Shortly after the execution of this memorandum a sum of £1487 was received by *F. Jones* for insurances upon the life of the intestate, which left *Jones* a debtor to the estate in a considerable balance.

Upon the completion of the repairs a lease of the houses in the City, dated the 4th of July, 1872, was granted for a term of forty years to *F. Jones* as the sole legal personal representative of *James Jones*, the intestate.

The authority of the 11th of May, 1872, and the lease of July, 1872, were shortly afterwards deposited by *F. Jones* with the Defendant *Joseph Stöhwasser* (since deceased) as a security for sums amounting to £3000 borrowed by *Jones*. The Plaintiffs alleged that this security was only on *Jones'* beneficial share. The Defendants alleged that it was given as a security on the entirety of the property.

In August, 1875, in consideration of further advances upon his acceptances *Jones* signed an agreement further charging the lease of the City houses.

The Plaintiffs were not informed by *F. Jones*, nor was any notice given to them by *Stöhwasser*, that their shares in the City property

had been charged. In 1875 the Plaintiffs settled the administration accounts with their brother, and paid him a sum of £428 16*s.*, which was shewn to be due to him upon the account of the intestate's estate. In answer to their inquiries they were then told by him that he had not borrowed any money on the security of their shares by virtue of the memorandum of May, 1872.

In May, 1877, *Jones* executed a mortgage to *Stöhwasser* of his one-fourth share in the hereditaments comprised in the lease of July, 1872, and also of the property belonging to him.

This mortgage was prepared so as to include *Jones'* one-fourth share only. It was alleged by the Defendants that this was done because *Stöhwasser* had mislaid the memorandum of May, 1872, which was deposited with him by *Jones* in August, 1872.

Upon subsequently finding that memorandum, instructions were given by *Stöhwasser*, who was pressing *Jones* for further security, for the preparation of a mortgage deed of the entirety of the City property.

After some discussion as to the form of the deed, and whether the Plaintiffs, whose names were in the first instance added as mortgagors, were necessary parties, a deed, dated the 13th of December, 1877, was prepared and executed by which (after reciting the authority of the 11th of May, 1872, and that £2712 2*s.*, part of the £10,000 secured by the mortgage of May, 1877, was advanced by *Stöhwasser* to *Jones* for the purpose of rebuilding the houses comprised in the lease of the 4th of July, 1872) *Jones* (who was made the sole mortgagor) mortgaged to *Stöhwasser* the messuages, &c., comprised in that lease, subject to a proviso for redemption on payment of £2712 2*s.* No communication was made to the Plaintiffs during this negotiation.

The Plaintiffs averred that at the time when that mortgage was executed nothing was due from the Plaintiffs to *Jones*, who was no longer under any liability in connection with the intestate's estate, and that *Stöhwasser* had notice that the authority of May, 1872, was no longer a subsisting authority; and that under the circumstances the execution of the mortgage was a breach of trust on the part of *Jones* of which *Stöhwasser* had notice.

In December, 1879, *Jones* became bankrupt.

In January, 1880, the Plaintiffs commenced this action for the

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purpose of obtaining an assignment from *Stöhwasser* (and since his death in February, 1880, from his representatives) of their shares in the premises comprised in the lease of July, 1872, the Plaintiffs offering to pay what, if anything, should be found due to the Defendants on the mortgage of December, 1877, which the Plaintiffs ought to pay, if the Court should be of opinion that they were liable to pay anything under the mortgage in order to entitle them to the assignment.

The effect of the evidence given by the Defendant *F. Jones* and by Mr. *Pike*, who had been *Stöhwasser's* solicitor and engaged in preparing the deeds of 1877, is stated in his Lordship's judgment.

Hemming, Q.C., and *Begg*, for the Plaintiffs:—

The authority given by the Plaintiffs in May, 1872, was limited to raising the money necessary for completing the houses comprised in the proposed lease, and did not enable the Defendant *Jones* to bind the Plaintiffs, the persons beneficially interested with himself, by a mortgage of the property to secure his own debt, even if he purported to do so. Moreover, the authority was limited to money required for the rebuilding, and no money was required. The *onus* of proving that the money was required rests on those who rely on the authority, and this *onus* they have not discharged, and plainly cannot discharge. In dealing with *Jones*, an administrator, it was the duty of *Stöhwasser* to have made inquiry whether the money was borrowed by him in his legal character of administrator for the purposes of the estate, or for his own private purposes only. Not having done this, and being content to rely upon the mere word of the borrower, he was guilty of gross negligence, is fixed with notice of what he would have learnt if he had made proper inquiry in 1872, and, as between himself and the Plaintiffs, the mortgage will not be allowed to stand: *Hill* v. *Simpson* (1); *M'Leod* v. *Drummond* (2); *Haynes* v. *Forshaw* (3); *Lewin* on Trusts (4).

H. Burton Buckley, for the Defendant *F. Jones* and his trustee in bankruptcy.

(1) 7 Ves. 152, 169.
(2) 17 Ves. 152, 170.
(3) 11 Hare, 93.
(4) 7th Ed. pp. 433, 434.

Sir *H. Jackson*, Q.C., *Horton Smith*, Q.C., and *Meyricke*, for the executors of *Stöhwasser* :—

By executing the memorandum or mandate of May, 1872, and thereby putting into the hands of the Defendant *Jones* the means of obtaining money, the Plaintiffs, in the absence of fraud, will not be allowed to repudiate their authority, or "to get rid of that transaction arising out of the security which they have entrusted to another, and of which they, the parties complaining, were the authors, without first repaying the money thus obtained": *Earl of Aldborough* v. *Trye* (1); and this is a principle of universal application: *Judd* v. *Green* (2).

Of two innocent parties the loss must fall on the one who picked out and entrusted the agent by whom the fraud was committed, and in fact enabled him to commit the fraud, not on the one who advances his money on the faith of the authority. Some attempt has been made to fix *Stöhwasser* with notice that the authority given to *Jones* was no longer a subsisting authority; but there is no proof whatever of such notice, nor is he fixed with notice that *Jones*, in executing the mortgage of the 13th of December, 1877, was committing a breach of trust. Independently of the authority of May, 1872, *Jones*, as administrator, had power, *virtute officii*, to mortgage, sell, and perhaps to grant leases of the intestate's estate, and in acting under that authority would not have been bound to answer any inquiries by *Stöhwasser* as to whether there were any existing debts of the intestate making it necessary to sell or raise money by mortgage: *Sabin* v. *Heape* (3). The authority or power of the 11th of May, 1872, being given as part of a security, was not revocable by the Plaintiffs: *Smart* v. *Sandars* (4); *Gaussen* v. *Morton* (5); *Abbott* v. *Stratten* (6).

BACON, V.C.:—

This is one of those unfortunate cases which occur so frequently in this Court where the question is upon which of two innocent persons the loss that has occurred must fall. The first thing to be considered is the nature and meaning of the memorandum of

(1) 7 Cl. & F. 436, 463.
(2) 45 L. J. (Ch.) 108, 111.
(3) 27 Beav. 553.
(4) 5 C. B. 895, 916.
(5) 10 B. & C. 731.
(6) 3 J. & Lat. 603, 613.

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the 11th of May, 1872. Four persons being entitled in equal shares to the beneficial interest in certain leasehold premises, it becomes necessary that money shall be expended for the purpose of improving their property, and they agree that they will bear in equal shares the necessary expenditure. One of them was an adult, a man of business, and also the legal personal representative of his late father; the other three were the daughters of the intestate, and they came to an agreement the substance of which is contained in the memorandum, which is the root and origin of the case before me. [His Lordship, after reading the memorandum, continued:—] Now, what is the meaning of that? It contains a plain qualification on the face of it, "such money as you may require." The persons signing that memorandum have at least a right to be informed of what was required. If they had been informed they would have acted as seemed best to them, but it cannot be read to mean "whatever sum you may say you may require." Still less, when it is presented to some person who is to become the mortgagee by virtue of the authority, would he be satisfied with the statement of *Jones* himself that he required that money in order to carry out those matters, *i.e.*, the outlay and the liabilities. I am considering the memorandum without reference to the subsequent transactions. He would have said, "It is all very well for your sisters to give that authority, and I dare say they will make it good, but I must let them know. First of all, I must inquire whether they know of the sum which you say you require; and even if that is not an indispensable necessity (as perhaps it was) I must give them notice the moment I lend you this money that you have mortgaged to me under that authority, and that from that time I shall have a security upon their interest in this property." No such thing was done at any time; no notice whatever was given in his lifetime by Mr. *Stöhwasser*, a man of business, acute, and lending his money upon security. No notice whatever was given to these ladies, nor has any fact come out in the course of this long and somewhat complicated discussion which would lead me to believe that they had ever, until shortly before the filing of the bill in this suit, any notice whatever that any mortgage had been executed binding their interests. In 1872 it appears that *Stöhwasser* lent a sum of money

to *F. Jones* upon a deposit of the lease of the houses in the City, which, as the lease expresses it, had then been rebuilt and were completed in pursuance of the agreement between the lessor and their late father. That lease so procured by *F. Jones*, to whom it was granted in his character of legal personal representative of his father, was deposited, beyond all question, with Mr. *Stöhwasser* to secure a then present advance made to him. I think it must be taken as clearly in evidence that at the same time *Jones* deposited with him the authority which the sisters (the Plaintiffs in this action) had signed. I say so notwithstanding that Mr. *Jones* has said upon his examination that his only object was to shew to *Stöhwasser* that his interest was one-fourth, and the interests of his sisters were the other three-fourths of this property. It was not in the slightest degree necessary, but if the object was to pledge the interests of the sisters, then it was indispensably necessary; and if there was nothing else in the case, considering all *Jones'* evidence, than that, I should utterly discard and disbelieve what he said upon his examination here, that his only reason for depositing the memorandum was to shew what their respective interests were in this property. Deposit it he did. I think the evidence upon that subject is conclusive. From 1872, when that deposit was made, down to 1877, no notice was given by *Stöhwasser* of the interest which he supposed he had acquired. It appears from Mr. *Pike's* evidence that *Stöhwasser* must, I think, fairly be taken to have been always under the impression that the sisters' shares were mortgaged to him, although the particular document, the authority, had been mislaid. Mislaid it was, and not forthcoming until the 29th of May, 1877, at which time a more regular mortgage had been executed by *Jones* of his own share, and only of his own share, in this leasehold property to secure to *Stöhwasser* the £10,000 which he owed him at that time.

Then arises what has given so much trouble in this case. *Stöhwasser*, searching among his papers, finds this authority. It is communicated by him to his solicitors, and he might reasonably say to them, "You see I was always right when I told you I had a security over the entirety of the leaseholds. I have found the paper which shews I have." That paper is laid before counsel,

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and then another deed is prepared for the purpose of giving effect to that authority, and a draft is prepared in the regular and proper form, and nobody after that interval of five years would have thought of preparing a document to which the sisters were not parties. A document is prepared to which they are made parties in the first instance, and that is submitted to a Mr. *Clarke* who purported to act as their solicitor, whose absence I most sincerely regret. If Mr. *Clarke* were here he would enable me to know what weight I ought to attach to the positive statement of Mr. *Jones* that he (Mr. *Clarke*) had no authority from the sisters, that he himself (*Jones*) chose, as he says, to follow his own course. He said that he instructed *Clarke* without any communication with his sisters; he does not know whether *Clarke* knew he had not seen his sisters. "*Clarke* asked to see my sisters; I said he must take his instructions from me. I took upon myself to instruct him. I chose to take my own course." That being the course taken, the second mortgage having been prepared in the manner I have mentioned, the sisters were made parties to that instrument, and the recitals in that instrument contain, among other things, this: "Whereas a part of the sum of £10,000, being £2712, was advanced by *Stöhwasser* to *Jones* for the purpose of rebuilding the messuages, tenements, and hereditaments comprised in the said indenture of lease." That undergoes no alteration. A very important alteration is afterwards made in the draft, for the sisters' names are struck out, Mr. *Jones* declining to make any communication to his sisters, and declining to let Mr. *Clarke* make any communication to them, and insisting that Mr. *Clarke* should take his instructions from him. Then the draft undergoes this alteration, that the terms of the authority are then introduced into it, and it is made a mortgage of the entirety of the estate for the purpose of securing the £2712. Then correspondence took place between the solicitors on that subject, and it is found that £2712 is the entirety, and one-fourth of it ought to be deducted because that is attributable to *Jones'* own beneficial interest, which was already mortgaged, and in that state the deed is executed.

The question before me is whether that deed so then executed reciting the authority which the sisters had signed, and acting

upon the authority, can prevail against them, and in my opinion it cannot.

I lay very little stress upon Mr. *Jones'* evidence, which is not to be relied upon. His conduct throughout shews that. I have alluded to the excuse he makes for depositing the authority in the first instance. I say, moreover, after that recital contained in the deed prepared and approved of by his own solicitor, containing the allegation that the money that had been advanced by Mr. *Stöhwasser* had been employed in the rebuilding of those houses, contrasting that deed under his hand and seal with what he says in the box, I cannot believe what he now says in the witness-box, nor do I find on his part any kind of explanation except the general explanation: "Mr. *Stöhwasser's* money was not employed in rebuilding the houses; I did not pay any of Mr. *Stöhwasser's* money for that purpose." That is all he says about it. No account was produced whatever, and there is no statement whatever. Under those circumstances, in my opinion, the deed having been executed with full notice and knowledge to Mr. *Stöhwasser*, and (as the correspondence shews) the sisters not having been consulted (although it had been thought at first that they ought to be consulted, and their concurrence to make the mortgage valid was, in the opinion of Mr. *Stöhwasser's* advisers, absolutely necessary) I think that mortgage cannot prevail against their interest.

But there is one reason which is very forcible to my mind. The sisters have stated in their statement of claim, and they have proved in their evidence, that in the year 1875 a settlement of accounts was come to between them and their brother, from which it appears that a balance amounting to £428 was then due to *Frederick Jones* on the capital account of the intestate's estate. The Plaintiffs then inquired of *Frederick Jones* if he had borrowed any money on the security of their shares, and he replied that he had not. They thereupon paid their fourth shares of the £428, and the capital account was thereby closed and the authority retracted. From 1872 to 1875 three years elapsed; during that time the sisters might have inquired, and did inquire, according to their statement in the statement of claim, and in their evidence, what had been done about this authority, and they had every reason to believe

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that what was then told them was true; that the authority never had been acted upon, and not having been acted upon, there was due to *Jones* that £400 odd, and that sum they paid. No doubt it was exceedingly rash and wrong on their part not to have insisted on the authority being delivered up to them, an imprudence for which I can find no kind of excuse, for they seem to have been alive to their own interest. They settled their account with *Jones*, and they paid him what he said was due upon the account without any objection, and took his word that that authority which they had given had never been acted upon.

The consequence of that is that Mr. *Stöhwasser's* security is good for nothing. If they had then said to *Jones*, "Now produce to us the authority, because that must be cancelled; we cannot leave that in your hands; you might borrow money upon it and charge our estate." If they had said that, the whole thing would have been found out, and *Jones* would have been exposed, and the manner in which he had dealt with the estate would have been ascertained. It is unnecessary to go into all that inquiry which has been gone into, I do not say improperly, as to what took place when the instructions were given to Messrs. *Pike* and the mortgage security was executed. There was the first mortgage and then the second mortgage reciting the authority. The Plaintiffs had reason to trust their brother, and no reason to doubt what he told them was true. They gave an earnest that they had no reason to doubt him by paying the £400 odd, and in my opinion the second mortgage of 1872 cannot prevail against them. The Plaintiffs, therefore, are entitled to the relief which they ask, which is to have an assignment of their three-fourth shares of the property comprised in the lease.

I do not intend to make the Defendants pay the costs, because I think the whole litigation has arisen from the imprudence of the sisters in first of all giving their authority, such as it was, which their brother had the means of making an improper and fraudulent use of. I think, moreover, that they ought to have required the delivery up to them of that authority, because they say they knew what the effect and meaning of it was. All that was present to their minds when they settled that account. If they had done that, which I think in all fairness they ought to

have done, I think the suit would have been unnecessary, and probably never would have been instituted. I cannot give them any costs, because I find it is by their own imprudence and by the misconduct of their trusted brother that this litigation has become necessary. And I cannot give any costs to *Stöhwasser* either, although I am bound to say I think his conduct, even taking Mr. *Jones'* account of it, is open to no sort of imputation. I think, however, it was his plain duty as a man of business, and his plain duty in law, to give notice to the Plaintiffs that their shares had been mortgaged by the brother under that authority; and therefore I cannot give him any costs.

Solicitors: *Duffield & Bruty; H. M. Pike.*

In re EARL DE LA WARR'S ESTATES.

Settled Estate—Proceedings for Protection of the Estate—Costs of Tenant for Life permitted to be paid out of Proceeds of Sale of Part of the Estate—Trustee Relief Act (22 & 23 *Vict. c.* 35), *s.* 30.

Where proceedings have been instituted (though without the preliminary sanction of the Court), whether by claim in an action, or by defence to an action, for the protection of a settled estate, the Court will, if it sees fit, give permission to the trustees to apply the proceeds of the sale of a portion of the estate in defraying the costs already incurred, and which must necessarily be incurred, by the tenant for life, in instituting such proceedings.

THE trustees of the settled estates of the Right Honourable *Reginald Windsor* Earl *De la Warr* presented a petition in the matter of the said settled estates and of the *Trustee Relief Act* (22 & 23 Vict. c. 35), praying the opinion, advice, and direction of the Court, first, whether the Petitioners might employ the whole or part of a sum of £780, then in their hands, representing real estate comprised in the settlement and sold under the power of sale therein contained, towards defraying the expenses which had been incurred by Earl *De la Warr*, the tenant for life, in the prosecution of those, among certain actions undertaken for the preservation of the settled estates, in which he had been already successful, and for the payment of which he had become liable; and, secondly, whether the Petitioners might employ the whole

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or part of the said sum towards defraying the expenses which had been incurred, and which must necessarily be incurred, by the Earl, by reason of a pending appeal in the action of *De la Warr* v. *Miles* [1878 D. 154] and in the defence of an action of *Hale* v. *Earl De la Warr* [1878 H. 513] then pending, or for indemnifying the Earl against his costs of the said pending appeal, or of the said pending action, or any costs that he might be ordered to pay therein.

Sir *H. Jackson*, Q.C., and *Elton*, for the Petitioners:—

Besides the action of *Earl De la Warr* v. *Miles*, in which judgment was delivered in this branch of the Court on the 14th of April, 1880, and which is now under appeal, and the action of *Hale* v. *Earl De la Warr*, which is pending, there have been several other actions in which Earl *De la Warr* was plaintiff, relating to these same estates. These actions came on before Mr. Baron *Pollock*, and in each of them judgment for the plaintiff was allowed to go by default. The defendants in these actions in most instances failed to pay any costs. Even in *Earl De la Warr* v. *Miles*, where the Plaintiff has obtained an order for party and party costs, his charges and expenses will exceed the amount of costs he will recover from the Defendants.

The principle of the present application is, that an estate preserved for the inheritance is an estate purchased for the inheritance. Moreover, in the *Leases and Sales of Settled Estates Act*, 1877 (40 & 41 Vict. c. 18), which is in the main a consolidation Act, a clause (18) was specially introduced, enabling the Court to "sanction proceedings for the protection of" a settled estate, and to order "that all or any part of the costs and expenses in relation thereto" be raised by a sale or mortgage of the settled estate.

The same kind of jurisdiction was invoked before Vice-Chancellor *Malins* in a case of Lord *Rivers'* estates, with reference to the costs of a suit of *Lord Rivers* v. *Adams*, the decision of which is reported (1). Vice-Chancellor *Malins'* order (2) was made on

(1) 3 Ex. D. 361.
(2) V.-C. M. 1874. Dec. 18.

In re Lord Rivers' Estate.

On a petition presented in the above matter, and in the matter of The *Property and Trustees Relief Amendment Act*, 1859 (22 & 23 Vict. c. 35), by the trustees of the will of the second Lord *Rivers*, and upon hearing counsel for the Petitioners, and for *Horace Pitt*, then sixth Lord *Rivers*, and *Augustus Lane*

the 18th of December, 1874, and the judgment of the Court of Exchequer, on a special case stated under a Judge's order made by consent, in August, 1873, was delivered on the 8th of August, 1878.

Cope, for the tenant for life.

BACON, V.C.:—

It seems that the principle in favour of this application is established by Vice-Chancellor *Malins'* order, which was made before the *Leases and Sales of Settled Estates Act*, 1877. Does not the 17th section of the Act contemplate some application to be made by the trustees before any proceedings are taken or costs incurred?

Sir *H. Jackson*:—In order to get an order under the Act of 1877, it is necessary that we should have come, before we commenced proceedings, for the Court's sanction. This we did not do, and consequently this petition was not intituled in the matter of the Act.

BACON, V.C.:—If you like to take the order without reference to the statute, I have no objection to make it, following the order made by Vice-Chancellor *Malins* before the Act was passed.

Sir *H. Jackson*:—That is what we should prefer to do. I only referred to the Act by way of narrative.

Fox, the Court made the following order:—

This Court is of opinion that the Petitioners may pay so much of the funds in their hands which have arisen from the estates now subject to the uses declared by the will of *George* second Lord *Rivers*, deceased, the testator in the petition named, not exceeding the sum of £3000, as may be necessary for the due prosecution of the actions at law in the petition mentioned, against *Charles Adams*, *Edwin Silas Ferrett*, and *John Isaacs*, or for indemnifying the said *Horace Pitt* sixth Lord *Rivers* against his costs of those actions, or any costs that he may be ordered to pay therein; and it is ordered that the costs of the Petitioners and of the said *Horace Pitt* sixth Lord *Rivers* and *Augustus Lane Fox* of this application be paid by the Petitioners out of such funds in their hands as aforesaid, such costs to be taxed by the Taxing Master as between solicitor and client.

V. Hawkins, for the Petitioners.

Solicitors: *Duncan, Murton, & Co.*

V.-C. B. 1881 *In re* EARL DE LA WARR'S ESTATES.

BACON, V.C.:—In asking for my opinion you could not do otherwise than state the provision of the statute.

The answers will be in the affirmative.

Solicitors: *Cope & Co.*

V.-C. B. 1881 *Feb.* 12.

In re KIT HILL TUNNEL. *Ex parte* WILLIAMS.

Company—Winding-up—Secured Creditor—Failure of Security—Creditor's Right to prove—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 107—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Rules*, 1870, *rr.* 99–102.

A creditor of a company, believing himself to be fully secured by the hypothecation under the hand of the managing director of a call on the company's shares, made no claim for his debt in the winding-up. The security turning out defective, by reason of the call moneys having been paid away partly before and partly since the letter of hypothecation:—

Held, that the creditor, never having assessed the value of his security was not prevented by the operation of sect. 10 of the *Judicature Act*, 1875, and rule 101 of the Bankruptcy Rules, 1870, from coming in and proving for the unsecured balance of his debt, on the terms of his disturbing no past dividend.

THIS was a summons adjourned from Chambers on behalf of *Robert Hamilton Williams*, that he might be at liberty to value the security which he held at the sum of £70, and to prove against the estate of the *Kit Hill Tunnel, Limited*, as a creditor in respect of the balance of his claim against the company, amounting to the sum of £430.

The company was registered under the *Companies Act*, 1862, on the 7th of September, 1877, with a capital of £25,000 in 5000 shares of £5 each, and became indebted to the applicant in a sum of £500, in respect of three bills of exchange; and on the 20th of December, 1877, the company, by a letter under the hand of *Stephen H. Emmens*, their managing director, promised to hypothecate to the applicant the proceeds of a forthcoming call of 10*s.* per share.

On the 12th of July, 1878, the call was made, and on the 17th of September, 1879, a letter of that date under the hand of

Emmens, was handed to the applicant in the following terms:— "In consideration of your discounting the following bills of the *Kit Hill Company*" (specifying bills to the amount of £500), "I hereby on behalf of *Kit Hill Tunnel, Limited*, under the powers conferred upon me by the articles of association, do hypothecate to you as collateral security for the due payment of the above bills, and any renewals thereof, the sums receivable as capital account from the call of 10*s.* per share, made July 12, 1878, and specified in the schedule of this letter, and I hereby undertake that the said sums shall be paid over to you or your order as and when received by this company until the full amount of the said bills shall be discharged."

On the 19th of January, 1879, the company was ordered to be wound up. Various orders were made directing the official liquidator to collect and pay into the *Bank of England* all moneys due from the contributories; and finally, by an order of the 9th of April, 1880, he was directed to pay in the amounts received by him in respect of the call of the 12th of July, 1878, such moneys not to be paid out without notice to the applicant.

On the 25th of November, 1879, the applicant's solicitor attended at Chambers in pursuance of the advertisement for creditors, and the consideration of his claim was adjourned for a week to enable him to consider whether he would value his security and prove for the balance, or give up his security and prove for the whole amount, or rely on his security.

On the 2nd of December, 1879, the solicitor again attended, and, being content with the security, did not claim to prove.

The official liquidator, by an affidavit sworn on the 9th of December, 1879, deposed that of the sum paid into the bank in respect of the call of the 12th of July, 1878, £56 10*s.* was the amount paid by contributories in respect of the call hypothecated to the applicant; also that there were three other contributories against whom proceedings had been taken for recovery of the call, amounting altogether to £17 10*s.*, hypothecated to the applicant.

By another affidavit filed in June, 1880, the official liquidator deposed that up to that date he had collected, of the calls hypothecated to the applicant, sums amounting to £55 19*s.* 11*d.* only,

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and that most of the persons whose names were set forth in the schedule to the letter of hypothecation, had paid the call of the 12th of July, 1878.

The summons was taken out on the 17th of December, 1880, and the applicant, by his affidavit in support, dated the 21st of December, deposed that he was under the impression that the amount of the calls hypothecated to him as aforesaid would be sufficient to cover the amount due to him on the bills, and relying upon a statement made to him by the solicitor of the official liquidator, that most, if not all, of the contributories were perfectly able to pay the amounts due from them, he did not think it necessary or desirable to value his security, which it would have been difficult if not impossible to do—and to prove for the balance as he was entitled. From the affidavit of the official liquidator filed in June, 1880, he became aware for the first time that, "through the gross misrepresentation and fraud of the company as represented by its managing director, I had been induced to advance moneys to a large extent on the security of calls already paid, or that in the alternative the calls hypothecated to me had been subsequently received and fraudulently misappropriated by the company."

A dividend of 5*s.* had been declared and paid to the other creditors.

H. Burton Buckley, for the applicant:—

The application is founded on sect. 107 of the *Companies Act*, 1862, and upon rules 20 to 28 of the General Order of November, 1862.

It is not sought to disturb the past dividend; and permission to the applicant to be allowed to prove will prejudice no one. Cases illustrative of the right to prove are *Ex parte Cama* (1); *Hicks* v. *May* (2).

If the provisions of the 10th section of the *Judicature Act*, 1875, be relied upon, the extent to which those provisions are to be carried is explained in *In re Withernsea Brickworks* (3), from the ruling of Lord Justice *Cotton*, in which case it follows that the

(1) Law Rep. 9 Ch. 686. (2) 13 Ch. D. 236.
(3) *Ante*, p. 337.

Order of November, 1862, is not, in this instance, superseded by the Bankruptcy Order of the 1st of January, 1870, rules 99–101.

Winslow, Q.C., and *C. H. Turner*, for the official liquidator:—

The first question is, do the Bankruptcy Rules apply to the present case—a question which must depend on the words of the 10th section, namely, that in cases of winding up "the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable... as may be in force for the time being under the law of bankruptcy"; and, towards the end, that "all persons who in any such case" (*i.e.*, of bankruptcy) "would be entitled to prove for and receive dividends out of the assets of any such company," may come in under the winding-up and make such claims against the same as they may be entitled to by virtue of the *Judicature Act*.

Now the 101st Bankruptcy Rule declares that the proof of "any such creditor shall not be increased in the event of the security realizing a less sum than the value at which he has so assessed the same." The creditor himself has to assess the value; the *onus* of doing this is not thrown on the trustee. In this case all parties were acting under a common mistake; they did not know that some of the calls had been paid. Other calls were paid after the letter of hypothecation; but all was done in ignorance of the applicant's rights. The applicant has deliberately elected to stand on his security, and he must be held to be precluded by the 101st rule from proving now.

If he be allowed to come in now, he must pay the costs of being so permitted: *Brown* v. *Lake* (1); *Angell* v. *Haddon* (2).

BACON, V.C.:—

I am not disposed to narrow the construction of the Act of 1875, and I certainly consider this to be a case to which the rules in bankruptcy would ordinarily apply.

This is a case where a creditor, believing himself to be fully secured, does not trouble himself to prove for his debt in the winding-up of the company. In the ordinary course of proceeding in bankruptcy, a creditor who is a mortgagee, or any other

(1) 1 De G. & Sm. 144. (2) 1 Madd. 529.

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creditor, may come in and prove; or he may rely on his security, if he thinks fit to do so. Even if his expectation fails him, if he is disappointed and finds that his security is not a good one, he may still come in and prove, provided that he does not disturb any dividend. But if he comes in to prove he must state the particulars of his security, and the value at which he assesses the same; and then it is provided that his proof shall not be increased if it should turn out that his security realizes less than the value at which he has assessed it.

Now the applicant in this case has not brought himself within either the letter or the spirit of the 101st rule, for he has not assessed his security at all. There is no "value at which he has so assessed" his security. The assessment has never been made. His being permitted to come in and prove will do no harm to anybody, as no dividend will be disturbed; and his right is clear.

There will be an order according to the terms of the summons; but I can give the applicant no costs. There will be no order as to costs.

Solicitors: *R. W. Marsland; J. Raven & Co.*

V.-C. B. 1880 *Dec.* 3.

GILBERT *v.* COMEDY OPERA COMPANY.

[1879 G. 220.]

Practice—Affidavits in Reply—Rules of Court, 1875, *Order* XXXVIII., *r.* 3—*Cons. Ord.* XXXIII., *r.* 7.

Affidavits filed by a Plaintiff in reply will not upon interlocutory motion be ordered to be taken off the file upon an allegation by the Defendant that they are not confined to matters strictly in reply; though at the hearing, if it should turn out to be so, the Court will not regard them, or may give leave to the Defendant to answer them.

MOTION by Defendants to take off the file affidavits filed by the Plaintiffs in reply, on the ground that they were not confined to matters strictly in reply within Rules of Court, 1875, Order XXXVIII., rule 3.

The question at issue was the meaning of the words "run of

the piece;" and the Defendants having filed twenty affidavits, the Plaintiffs replied with fifty-one, all of which, as it was alleged, were directed entirely to the confirmation of the case made by his affidavits in chief, and were not strictly in reply.

Sir *H. Jackson*, Q.C., and *Maddison*, in support of the motion :—

These affidavits being simply affidavits in support of and strengthening the Plaintiff's original case, and not being directed to cutting down the Defendant's evidence, cannot be admitted, as by Rules of Court, 1875, Order XXXVIII., rule 3, which re-enacts with trifling variations Cons. Order XXXIII., rule 7, such affidavits "shall be confined to matters strictly in reply." In *Peacock* v. *Harper* (1) affidavits in reply which were confirmatory of the plaintiff's evidence-in-chief were admitted at the hearing; but we submit that the Vice-Chancellor in that case was mistaken in holding that the former practice had not been altered by Order XXXVIII., rule 3. Under that rule there is no such provision as existed under the former practice that leave might be given to the defendant, upon the hearing of the motion for decree, to answer them. We are not bound to wait until the hearing to raise this objection, but may at once apply to have the affidavits taken off the file. If this application is refused, then we apply for leave to file affidavits in reply.

Everitt, for the Plaintiffs, was not called on.

BACON, V.C. :—

The old practice relating to this subject was quite plain. The General Orders conferred certain powers on the Judges, and a great part of those powers, in my opinion, they still retain. What does Cons. Ord. XXXIII., rule 7, say? Not that the plaintiff shall not file affidavits which are not confined to matters strictly in reply, but that "except so far as these affidavits are in reply they shall not be regarded by the Court unless upon the hearing of the motion (for decree) the Court shall give leave to the defendant to answer them." The order does not say, nor does the practice require, that affidavits not strictly in reply shall be taken

(1) 7 Ch. D. 648.

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off the file. I am bound not to exclude proper evidence, and the Court has power, as I hope it always will have power, to give liberty to the Defendant to file new affidavits, having full control in the matter. But until the hearing I cannot tell whether the affidavits objected to are really strictly in reply or not. I have nothing to guide me at this stage of the proceedings. If they are not strictly in reply the Court will not regard them at the hearing, but that is a question which cannot now be decided.

In my opinion, the very terms of Order XXXVIII., rule 3, preclude me from listening to either of the alternatives presented to me by the Defendants, and the application must be refused with costs.

Solicitors for Defendants: *H. Kimber & Co.*
Solicitors for Plaintiffs: *Lewis & Lewis.*

In re WILKES' ESTATE.

V.-C. H.
1880
Nov. 12.

Lands Clauses Act, 1845, *s.* 74—*Lands subject to beneficial Leases taken by Railway Company—Tenant for Life and Remainderman—Purchase-money, Application of Income of—Form of Order.*

A railway company took freeholds settled by a will, and subject to eight leases, one granted by the testator and the other seven granted under powers in the will, either by the trustees or the tenant for life, and containing covenants by the lessee to repair or rebuild. The company purchased the leasehold interests from the tenants themselves, and paid the purchase-moneys of the fee, subject to the lessees' interests, into Court under the *Lands Clauses Consolidation Act*, 1845. The income of the purchase-moneys when invested would be greater than the aggregate rents payable under the leases :—

Held, upon petition by the tenant for life for investment and payment to him of the dividends, that, having regard to the 74th section of the *Lands Clauses Consolidation Act*, 1845, he was entitled, during the continuance of the leases, to so much only of the dividends as equalled the amount of the rents he would have received in case the property had not been taken by the railway company; that the rest of the rents must be accumulated; and that, upon the date of falling in of each lease, the tenant for life would be entitled to an additional annual sum representing the income of so much of the capital of the purchase-moneys as was attributable to the property comprised in the lease which had fallen in, and of the accumulations thereof, less the rent under such lease.

In re Wootton's Estate (1) followed.

Form of Order.

PETITION.

John Wilkes, who died in August, 1848, by his will, dated in May, 1847, devised (subject to certain annuities) freehold hereditaments in the county of *Middlesex* to the use of his nephew, the Petitioner *Robert Heard*, for life, without impeachment of waste, with remainder to the use of the testator's brother for life, with divers remainders over; and in the will was contained a power enabling any male tenant for life of full age, and also the trustees of the will during the minority or coverture of any tenant for life, to demise the hereditaments for any term of years not exceeding twenty-one, or on repairing leases for any term not exceeding

(1) Law Rep. 1 Eq. 589.

And see Osborn v. Woodhead 14 Ch D. 27. CA.

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sixty years, so as there was reserved on every demise under the power the best yearly rent without taking any fine, premium, or foregift, beyond covenants to rebuild or extensively repair, or to expend money in the improvement or amelioration of the demised property.

Under the powers of the *Great Eastern Railway Act*, 1876, which incorporated the *Lands Clauses Consolidation Act*, 1845, the *Great Eastern Company* took, for the purposes of their undertaking, certain messuages in the parish of *Christchurch, Spitalfields*, forming part of the freehold hereditaments so devised as aforesaid. These messuages had all been demised either by the testator, the trustees, or the Petitioner, and they were, at the time when they were taken by the company, subject to the eight following indentures of lease:—(1) Five of them in *Farthing Hill* and *King Street* were comprised in an indenture of lease granted by the Petitioner for the term of twenty-one years from the 24th of June, 1873, at the rent of £65, with a covenant by the lessee at his own expense to repair and put the demised premises in complete order, repair, and condition; (2) Three of them in *King Street* were comprised in a lease granted by the Petitioner for a term of twenty-one years from the 25th of March, 1873, at the rent of £65, with a similar covenant by the lessee; (3) Four of them in *King Street* were comprised in a lease granted by the Petitioner for a term of twenty-one years from the 25th of March, 1874, at the rent of £70, with a similar covenant by the lessee; (4) Six of them in *King Street* and *Queen's Court* were comprised in a lease granted by the Petitioner for the term of twenty-one years from the 24th of June, 1873, at the rent of £30, in consideration of the expense of the lessee in rebuilding; (5) Five of them in *King Street* were comprised in a lease granted by the Petitioner for the term of sixty years from the 25th of March, 1874, at the rent of £44 4*s.*, with a covenant by the lessee to rebuild at his own expense; (6) One of them in *King Street* to a lease granted by the trustees for the term of fifty years from the 29th of September, 1852, at the rent of £9, with a covenant by the lessee to rebuild the demised premises at his own expense; (7) Six of them in *King Street* and seven in *Matthews Place* were comprised in a lease granted by the trustees for a term of thirty-

two years from the 25th of March, 1853, at the rent of £56, with a covenant to complete the repairs of part of the demised hereditaments, in consideration of the expense of rebuilding other part by the lessee; and (8) Several of them in *Brick Lane* and *King Street*, to a lease granted by the testator for the term of forty years from the 25th of March, 1845, at the rent of £80.

The total amount of the rents reserved by these leases was £419 4*s*.

The company dealt separately with the lessees, and bought up their interests, and the purchase-money for the freehold, subject to the lessees' interests, was ascertained at £21,000, including £10 per cent. for a compulsory sale. This sum the company paid into Court to the credit of *Ex parte* the Company, in the matter of their Act, "in respect of lands and hereditaments belonging to *Robert Heard* as tenant for life without power of sale."

Robert Heard and the annuitants now petitioned for investment of the £21,000 purchase-money, and that after provision had been made for the annuities, the whole of the remaining dividends might be paid to *Robert Heard* during his life.

The dividends on the £21,000 when invested would amount to more than the £419 4*s*., which was the aggregate rental of the property before it was taken by the railway company, and the question was, whether, having regard to sect. 74 (1) of the *Lands Clauses Consolidation Act*, 1845, the tenant for life was or was not entitled (subject as aforesaid) to the whole of such dividends.

Renshaw, for the Petitioners:—

The tenant for life is entitled (subject to the annuities) to the

(1) The 74th section is as follows:—"Where any purchase-money or compensation paid into the bank under the provisions of this or the special Act shall have been paid in respect of any lease for a life or lives or years, or for a life or lives and years or any estate in lands less than the whole fee simple thereof, or of any reversion dependent on any such lease or estate, it shall be lawful for the Court of Chancery in *England* or the Court of Exchequer in *Ireland*, on the petition of any party interested in such money, to order that the same shall be laid out, invested, accumulated, and paid in such manner as the said Court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate or reversion in respect of which such money shall have been paid or as near thereto as may be."

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whole of the dividends of the £21,000 purchase-money: *In re Steward's Estate* (1); *In re Dean and Chapter of Westminster* (2). There is, no doubt, some conflict of authority, and the later decision of Vice-Chancellor *Kindersley*, in *In re Wootton's Estate* (3), appears inconsistent with his former holding in *In re Steward's Estate*, as also does the judgment of *Romilly*, M.R., in *In re Mette's Estate* (4). In *In re Wootton's Estate*, Vice-Chancellor *Kindersley* said: "The tenant for life claims to be entitled to the whole of the income of this sum of £4840. What the jury had to value was not the whole fee, but the reversion subject to the lease; and it must be assumed that the jury put the right and true value on what they had to value. The value of the whole fee would be the value of this reversion, plus the value of the lessee's interest, which has been separately dealt with. Now it is clear that the persons entitled in remainder are entitled on the determination of the lease to have the value of the whole fee forthcoming in Court, which they will not have if the tenant for life receives the whole income of the £4840 during the remainder of the term of the lease; and there is no reason why the tenant for life should receive more income than she did before the land was taken."

[HALL, V.C.:—It seems to be the true view that the tenant for life should get what he would have got if the land had not been taken. If the property had been taken by the company after either of the leases had fallen in, it would have been worth so much the more.]

In *In re Wootton's Estate* the lease was granted before the date of the will. In this case five of the leases were granted by the tenant for life himself, and if he had chosen he might have demised at a rack rent, and then there would have been no question that he would have been entitled to the whole income. What he did, however, was in fact for the advantage of the reversioner. The tenant for life is at all events entitled to have, in addition to the amount he previously received, the income from the £10 per cent. added to the purchase-money for the compulsory taking from him

(1) 1 Drew. 636.
(2) 26 Beav. 214.
(3) Law Rep. 1 Eq. 589, 591.
(4) Ibid. 7 Eq. 72.

of the lands; for the property is compulsorily taken as much from the tenant for life as from the remainderman.

Alfred Bailey, for the persons entitled in remainder:—

I invite the Court to follow the later decision of Vice-Chancellor *Kindersley*, in *In re Wootton's Estate* (1), which was adopted in *In re Mette's Estate* (2), and lays down the simple rule that when lands subject to demise are taken by a railway company, and separate values are put on the lease and the reversion, the tenant for life shall be neither better nor worse off than he was before. Otherwise, in each case the Court would have to examine into the beneficial covenants and to see whether they could be or were being carried out. The surplus dividends must be accumulated, so that at the time when all the leases would have fallen in there shall be in Court that which represents not only the fee minus the leases, but the whole fee. At the time when each lease would have fallen in, however, the tenant for life will be entitled to have paid to him the dividends on the fund attributable to the leaseholds which were comprised therein. For this purpose it will be necessary to have the capital attributable to the leases apportioned between them, and it would be highly convenient if this could be done in the present order, otherwise a fresh application for the purpose will have to be made as each lease falls in.

Jason Smith, for the company.

HALL, V.C.:—

The principle laid down in *In re Wootton's Estate*, and followed in *In re Mette's Estate*, must be adopted and the order framed accordingly. No distinction can be drawn between the additional 10 per cent. for compulsory purchase and the rest of the purchase-money.

The Vice-Chancellor then indicated the form of an order,

(1) Law Rep. 1 Eq. 589. (2) Law Rep. 7 Eq. 72.

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In re WILKES' ESTATE.

which was ultimately drawn up, to the effect stated in the minutes annexed:—

MINUTES:—"This Court is of opinion that *Peter Robert Heard* as the tenant for life in possession of the estates in the county of . . . devised by the will of . . . is entitled, subject to the payment by him of . . ." (the annuities charged thereon), "to be paid during his life out of the income arising from the investment of the purchase-money of £21,000 for the several properties forming part of the said estates in the petition stated to have been purchased at the said price of £21,000 by the *Great Eastern Railway Company*, such a sum as, until the 25th of March, 1885, when the first to determine of the eight leases in the petition mentioned, subject to which the properties were so purchased, would have determined, will amount to £419 4*s.*, being the total yearly amount of the several rents reserved by such leases, and after the time or respective times at which each of the said eight leases would have respectively determined, to be paid the like sum of £419 4*s.*, after deducting therefrom an amount equivalent to the rent or rents respectively reserved by the lease or leases which for the time being would have so determined, and also to be paid in addition thereto the income of the investments representing the whole of such portion or portions of the said purchase-money of £21,000 as arose from or is or are attributable to the property or properties subject to such determined lease or leases and the income of the accumulations arising from so much as is hereinafter directed to be accumulated of the same portion or portions of the said purchase-money. And" (after directions as to investment in consols and payment of the annuities) "out of the dividends as they accrue on the Consolidated £3 per Cent. Annuities so to be purchased as last aforesaid, it is ordered that the annual sum of £285 17*s.* 4*d.*, being a sum equivalent to £419 4*s.*, the net amount of the said rents after deducting therefrom the sum of £133 6*s.* 8*d.*, one-third of the total amount of the said annuities, be, until the 25th day of March, 1885, during the life of the Petitioner *Robert Heard*, if the Petitioner *Robert Heard*," and (the annuitants) "so long live, paid to the Petitioner *Robert Heard* by equal quarterly payments of," &c. "And it is ordered that the residue of the said dividends be from time to time invested in Consolidated £3 per Cent. Annuities. And the Petitioner *Robert Heard* is to be at liberty to apply at Chambers on the death of the said" (annuitants) "or either of them, and also from time to time after the date or respective dates when each of the said leases would have determined touching the payment to him of such increased income as he may for the time being have become entitled to, as he may be advised. And it is ordered that inquiry be made what are the respective portions of the said purchase-money of £21,000 which arose from or are attributable to each of the eight several properties purchased by the said company as in the petition mentioned, subject to the eight leases under which the same were held. And pursuant to the 80th section of the *Lands Clauses Consolidation Act*, 1845, it is ordered that the *Great Eastern Railway Company* do pay to the Petitioners and Respondent their costs remaining unpaid, including therein all reasonable charges and expenses incident thereto of the purchase or taking of the lands in the petition mentioned by the said company, or which have been incurred in consequence thereof, and of the investment of the said money on deposit in the said annuities and of obtaining this order and of all proceedings relating

thereto, and of every or any power of attorney which may be executed by the Petitioners, or any of them, to enable them respectively to receive the dividends for the time being payable to them respectively (1), except such costs, if any, as are occasioned by litigation between adverse claimants, such costs, charges, and expenses to be taxed by the Taxing Master in case the parties differ."

Solicitors: *Langley; Curwood.*

(1) Some of the petitioners were resident in *Ireland*.

C. J. B.
1881
Jan. 31.

Ex parte WILLOUGHBY. *In re* WESTLAKE.

Artificer's Lien on Ship—Contract to take Bills in Payment—Possession—Negotiation of Acceptance.

Engineers contracted with the debtor, the owner of a barge, to supply steam machinery to the vessel, at the docks of a dock company, for the price of £1050, to be paid by approved bills; one at three months for £260 when the boiler and engine should be placed in the vessel, one at three months for £260, and one at six months for £530, when the vessel should have made a trial trip.

The vessel having been taken to the docks, was there entered in the name of one of the engineers; and, whilst shipwrights and other agents of the debtor were occasionally or constantly on board, the vessel remained in the possession of the engineers till the boat was ready to make a trial trip.

In the interim the engineers had been paid £360, partly in cash, and partly by the debtor's acceptance, which they discounted.

On the day appointed for the trial trip the debtor filed a liquidation petition, and a receiver took possession of the vessel. A few days afterwards the debtor's acceptance was dishonoured:—

Held, that the lien of the engineers for the unpaid price for the machinery and their labour was not affected by their having agreed to take bills in payment, nor by the nature of the possession, nor by their having discounted the debtor's acceptance.

APPEAL from the County Court at *East Stonehouse, Devon.*

In October, 1878, the debtor, *Thomas Westlake*, brick manufacturer at *Calstock*, on the *Tamar*, near *Plymouth*, employed his brother, *John Westlake*, to build for him a barge in a yard called *Bealswood*, at *Gunnislake*, near *Calstock*. The barge was called the *Bealswood*, and was launched in June, 1879; and it being intended that she should be worked by steam machinery, a contract for supplying such machinery was entered into between the debtor and the Appellants Messrs. *Willoughby*, engineers, of *Plymouth*, which was thus expressed in a letter dated the 18th of June, 1879, addressed by *Willoughby Brothers* to *Thomas Westlake*:—

"We hereby agree to supply a set of machinery according to the accompanying prospectus and plans . . . and fix the same in your boat at the *Great Western Docks, Plymouth*. . . . The time to be occupied in making and fixing the boiler, engines, &c., to be

from four to five months, and the price for same £1050, in payments made by approved bills as follows: one at three months' date for £260, when boiler and engine are placed in the vessel, not fixed; one at three months' date for £260, and one at six months' date for £530, when the vessel has made a trial trip such as would permit *Lloyds'* surveyor to grant a certificate, the granting of this certificate by *Lloyds'* surveyor to be accepted as satisfactory evidence that the order is duly executed. . . . During the progress of the work, either in our factory, or on board, your engineer to be at liberty to inspect it at any time. Yours truly, *Willoughby Brothers.*"

In December, 1879, the barge was moved down the river from *Calstock* to the dock at *Plymouth* to be fitted. She was then in charge of *John Adams*, who was in the service of the debtor. *John Westlake*, the builder, and several shipwrights were also on board. On reaching the dock a conversation was held, as to which there was some difference in the recollection of the witnesses, but in the result the barge was entered in the dock books in the name of *Willoughby*. The Appellants had no dock of their own, and used the *Great Western Docks* for this and other vessels sent to them to fit and repair.

As to the subsequent possession of the vessel, there was some further conflict of testimony. The debtor's witnesses said that after the boat was in the dock *Adams* left her, but that the shipwrights in the pay of the debtor remained on board, and that possession either by these workmen or by *Adams*, who afterwards came on board again, was retained on behalf of the debtor until the 22nd of April, 1880. The Appellants said that they were in sole possession throughout.

On the 1st of August, 1879, the debtor paid the Appellants £100 on account. On the 26th of January, 1880, he purported to pay them £158 15*s.* by giving them his acceptance of a bill of exchange worded as follows:—

"£158 15*s.* "*Central Foundry, Plymouth,*
"Jan. 26, 1880.

"Three months after date pay to our order one hundred and

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fifty-eight pounds fifteen shillings, being the balance of first payment (£260) on account of the machinery for the steamship *Bealswood*.

"*Willoughby Bros.*"

Thus the whole of the first £260 was supposed to be made up, the difference of £1 5*s.* being an abatement for interest on the £100 paid in advance.

On the 14th of February, 1880, the debtor made another payment of £100. Of this sum £77 16*s.* 6*d.* was paid by a bill accepted by persons named *Caldwell* and another, which was duly paid at maturity, and £22 3*s.* 6*d.* was paid in cash.

On the 22nd of April, 1880, the vessel was ready to proceed on her trial trip, and steam was being got up for the purpose, when, the debtor having that day filed a liquidation petition, a receiver was put in possession of the vessel.

The acceptance for £158 15*s.* falling due on the 29th of April following, was dishonoured.

Under these circumstances Messrs. *Willoughby* claimed a lien on the vessel for the unpaid balance of the £1050.

From the evidence of *William Booth*, an agent of the Appellants, it appeared that he himself discounted the bill for £158 15*s.* for Messrs. *Willoughby*. As to the delivery of the barge to the dock company, *Booth* deposed as follows: "I told the captain (*Adams*) to deliver the barge to Messrs. *Willoughby*. I told Messrs. *Willoughby* to put her in the docks in their own name. I considered it was right to go into their name, and to hold them responsible in case of any damage."

By an order dated the 17th of November, 1880, it was directed that possession of the barge "now lying in the *Great Western Docks* at *Plymouth*, the property of the said debtor, together with the engines and gear now on board the said barge, be given by" Messrs. *Willoughby* to the trustee in the liquidation.

This was the order appealed from.

In the course of his judgment the learned judge observed: "A good deal of argument was expended on the question as to whose possession the barge was in during the time the repairs were being done, and at the time of the liquidation, but I do not think it

material to consider that question, though, if necessary, I should conceive she was in possession, neither of the debtor, nor of Messrs. *Willoughby*, but of the dock company, though possibly if, irrespective of that technical matter, the circumstances were such as to justify a claim of lien, Messrs. *Willoughby* might be considered as having such a special property and possession of the vessel as might suffice to support the claim. But there is abundance of authority that where, by agreement, or even by custom or usage of trade, the owner of a ship is entitled to credit for repairs done to a ship, there is no lien on her for such repairs: *Raitt* v. *Mitchell* (1); and the reason is obvious, for the ship may be wanted before the limit of credit is expired: *Spartali* v. *Benecke* (2); *Horncastle* v. *Farran* (3); where it was also held that the negotiation of a bill of exchange amounted to an approval of such bill, and its receipt and negotiation amounted to a relinquishment of a previous lien on goods for freight. *Hewison* v. *Guthrie* (4) is an authority to the same effect."

Winslow, Q.C., and *G. Pitt-Lewis*, for the Appellants:—

The only substantial question is whether the Appellants can claim a lien.

The learned County Court Judge cited *Raitt* v. *Mitchell* for the proposition, that where credit has been given the lien is gone. But taking a bill in payment is not giving credit, and in this very case Lord *Ellenborough* goes on to observe, "I do not say that a shipwright has not a lien on a ship in his dock, where he is to be paid in ready money as soon as the repairs are finished. On the contrary, I am inclined to think that he has a lien like other artificers." This was followed by *Franklin* v. *Hosier* (5), where Lord *Campbell*, in an argument which was successful, refers to *Raitt* v. *Mitchell*, and marks the difference in the cases of where the repairs are done on credit, and of where the money for the repairs is due whilst the ship remains in the possession of the carpenters. He refers also to *Ex parte Bland* (6), where Lord *Eldon* approves of the same doctrine, as laid down in *Abbott* on

(1) 4 Camp. 146.
(2) 19 L. J. (C.P.) 293.
(3) 3 B. & Ald. 497.
(4) 2 Bing. N. C. 759.
(5) 4 B. & Ald. 341.
(6) 2 Rose, 91.

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Shipping (1). This passage occurs in *Prentice's* Edition of *Abbott* on Shipping (2); and see *Maclachlan* on the Law of Merchant Shipping (3).

The contract here was one and indivisible, and the property in the engines was not intended to pass until they were paid for: *Anglo-Egyptian Navigation Company* v. *Rennie* (4). Until payment neither the receiver nor anybody else was entitled to take them out of the Appellant's possession.

The cases relied upon by the learned County Court Judge have no application. *Spartali* v. *Benecke* (5) establishes two points; one, that a contract that wool is to be paid for at a month's date less 5 per cent interest, is consistent with an obligation to deliver the wool at once; secondly, that usage of trade cannot be set up against a specific contract. *Horncastle* v. *Farran* (6) establishes that negotiation of a bill is proof of having approved it; and, possibly, if we had been fully paid in bills approved by us, we might have lost our lien. *Hewison* v. *Guthrie* (7), as the learned Judge observes, is to the same effect; but it is inapplicable in this case, where we have been only part paid. That part payment does not discharge a lien appears from *Hodgson* v. *Loy* (8) and other cases.

The cases relied upon for the passage in *Maclachlan* on Merchant Shipping (9), above referred to, are *Franklin* v. *Hosier* (10), *Ex parte Bland* (11), and *Ex parte Shank* (12). The two latter decide that the lien for repairs of a ship is not gone, unless and until possession is parted with.

In *Gunn* v. *Bolckow, Vaughan, & Co.* (13), it was held that the giving an acceptance is not absolute payment, but payment conditional on the bills being met.

Finlay Knight, for the Respondent, the trustee:—

The question is whether, under the special circumstances of the

(1) Page 134.
(2) 12th Ed. (1881), pp. 100, 101.
(3) 9th Ed. (1876), pp. 7, 107.
(4) Law Rep. 10 C. P. 271.
(5) 19 L. J. (C.P.) 293.
(6) 3 B. & Ald. 497.
(7) 2 Bing. N. C. 759.
(8) 7 T. R. 440.
(9) Page 107.
(10) 4 B. & Ald. 341.
(11) 2 Rose, 91.
(12) 1 Atk. 234.
(13) Law Rep. 10 Ch. 491.

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case, the engineers have not contracted themselves out of their right to lien.

The contract was a contract to give credit, that is to say, to take not money but bills. The Appellants not only contracted to take, but they did take, the debtor's acceptance of the bill for £158 15*s.*, and that acceptance they negotiated. It was not in their hands, but in the hands of *Booth*, at the date of the liquidation. These two things together are sufficient to destroy the right of lien. The terms of the contract are inconsistent with the right, and the contract of the Appellants precludes them from setting it up.

The main portion of Lord *Ellenborough's* judgment in *Raitt* v. *Mitchell* (1) was not read on the other side. His Lordship observes: "It is distinctly proved that where there is no express stipulation for a ready money payment, credit is invariably given by shipwrights in the river *Thames*. . . . This being the invariable usage, I must consider it as the basis of the contract between these parties; and their respective rights and liabilities are precisely the same as if without any usage they had entered into a special agreement to the like effect. In that case it seems to be admitted that no lien could be claimed. To be sure, a lien is wholly inconsistent with a dealing on credit, and can only subsist where payment is to be made in ready money, or there is a bargain that security shall be given the moment the work is completed." And, accordingly, His Lordship held that the Defendants had no right to detain the Plaintiff's ship. In *Chase* v. *Westmore* (2) it was held that where the parties contract for a particular time or mode of payment, the workman has not a right to set up a claim inconsistent with the terms of the contract.

The principle of workman's lien is different from that of vendor's lien. Workman's lien is excluded by special contract; as here, where the engineer agreed to take bills, not money.

Thirdly, all the authorities shew that the possession of the artizan claiming the lien must be an exclusive possession. Can the Court say, upon this evidence, that the Appellants had exclusive possession of this vessel?

(1) 4 Camp. 146, 149. (2) 5 M. & S. 180.

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Winslow, in reply (except as to the question of possession, on which the Court did not call for a reply).

The argument is that we have contracted ourselves out of the lien. But we have not received payment. Directly the acceptor failed, our lien revived. What is this but vendor's lien? We sold the debtor the engines; and we have a right to say to the trustees, you shall not take away the machinery without paying for it. The trustee wants to have the benefit of the contract, and to escape its liabilities. The clause about the trial trip was inserted for the debtor's benefit, and it was the debtor's or the receiver's intervention which prevented the trial trip taking place. From that moment our lien came into existence.

BACON, C.J.:—

The case is not without some little difficulty, but in my opinion the lien is established from the facts that have been shewn, and according to the law applicable to the case.

Nobody can dispute the general proposition that an artizan has a lien upon the goods on which he works until he has been paid the amount due to him. But that does not quite cover the present case, because this is not a case of a shipwright doing work to a ship, but that of a contractor who agrees to furnish engines and other machinery for a stipulated price. Part of the price is paid, but in my opinion that makes no difference. The debtor, for his own purposes, places the ship in the possession of Messrs. *Willoughby*, in order that the contract may be completed. The ship is placed in their possession under the circumstances stated in evidence. Mr. *Booth* says that in order to avoid responsibility on the part of the debtor he caused the ship to be entered in the dock company's book in the name of *Willoughby*. Accordingly it was entered in that name; and Messrs. *Willoughby* did take the possession for the purpose of completing their contract. The fact of possession is therefore, I think, beyond all question or doubt upon the evidence. A necessary ingredient constituting a lien is that the person claiming it should have possession. Here I find the *Willoughbys* had full possession.

Then it is said that the contract is a contract to give credit.

Messrs. *Willoughby* are payable by instalments, and upon certain conditions which, owing to the bankruptcy, cannot be performed except by the consent of the parties. But does that make any difference? Have Messrs. *Willoughby* ever parted with the possession of their chattels, the engine and boiler? I am quite clear that they have not; and that the engines and boilers are as much in their possession as they were before they left their factory. The case which has been referred to by Mr. *Winslow* as being most like the present, namely, *Franklin* v. *Hosier* (1), was a case of lien for repairs done to a ship. In my opinion there is no difference between work done and pieces of machinery supplied. One or the other at once gives to the person furnishing the work or the machinery a lien on the property until the contract between the parties has been performed. *Willoughbys* have been ready to perform, and have, so far as they have been permitted to do so, performed the contract on their part; the debtor has prevented the further performance of the conditions prescribed by the agreement. There can now be no trial trip except by consent, unless Messrs. *Willoughby* take upon themselves the *onus*, which they are not obliged to do, of sending the vessel to sea for the purpose of having a trial. I cannot, therefore, distinguish this from the most ordinary case of an artizan who undertakes to work upon goods for the benefit of the man who employs him—an artizan who is to be paid a price, and who, until the price is paid, has a right to retain the goods. In this instance the payment of the price was to have been made by two bills after the vessel had been found fit for sea upon her trial trip. That cannot now be effected except by consent. But the trustee does not propose to complete the contract. Admitting that the contract had not been completed by the debtor, he asks to have the benefit of part of it. He requires the engineers to supply the steam engine and boilers and to fit them into the ship, or at least to leave to him what they have already done; and at the same time he repudiates the rest of the contract, refuses to pay anything, and refuses to give any bills. If I felt any doubt about the case, it would be dispelled by the decision in *Raitt* v. *Mitchell* (2), which plainly recognises the right of an artizan to a lien on goods upon which he has expended labour. And, having

(1) 4 B. & Ald. 341. (2) 4 Camp. 146.

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regard especially to the case of *Franklin* v. *Hosier* (1), I am of opinion that the lien has been established, and that the right of the trustee to these chattels must depend upon the performance by him of the entire contract, and the payment of the entire price. The part payment which has been made in no sense affects the case, and if the £158 15*s.* had been paid in cash, instead of by a bill which was dishonoured, I think that would have made no difference.

I cannot say the case is without difficulty, but that is the conclusion at which I have arrived, and I think the Messrs. *Willoughby* are entitled to the possession of this vessel, belonging to the trustee, until the trustee pays their charges for the machinery they have supplied and the work they have done on board the vessel.

The order of the Court below must be discharged with costs below, as well as of this application.

With regard to Mr. *Finlay Knight's* argument that the possession was not exclusive, I consider that Messrs. *Willoughby's* possession was exclusive so far as regards the power of moving the ship. It is true there were shipwrights' men at work on board as well as the engineers, but by the testimony of both *Adams* and *Booth* the possession of the ship was with the Appellants.

Solicitors: *Gush & Phillips*, agents for *J. P. Pearse, Plymouth; Crowder, Anstie, & Vizard*, agents for *John Shelly, Plymouth.*

(1) 4 B. & Ald. 341.

In re RICHARDSON. *Ex parte* HARRIS.

C. J. B.
1880
Dec. 20.

Disclaimer of Lease by Trustee—Extension of Time—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 24.

The mere fact that the lessor has availed himself of the provisions contained in the debtor's lease to compel the trustee in liquidation to pay half a year's rent in advance, is not, in the absence of negotiation, or of anything to mislead the trustee, or of special circumstances to excuse the delay, a ground for enlarging the time, after the expiration of the twenty-eight days (fixed by the *Bankruptcy Act*, 1869, s. 24), for notice to be given by the trustee, whether he disclaims the lease or not.

APPEAL by the trustee in liquidation of *Daniel Richardson* against an order of the *Cumberland* County Court dismissing an application by the trustee for leave to disclaim as from the 2nd of February, 1881, his interest in a farm and premises (*Churchrigg Farm*) of which *Richardson* was lessee under a lease for ten years from February, 1878, at a rent of £165 per annum.

It was provided by this lease that the lessor might distrain at any time during the tenancy for one half year's rent in advance, allowing 5 per cent. discount on any such prepayment.

On the 10th of June, 1880, *Richardson* filed a liquidation petition, under which, on the 8th of July, *Harris*, the Appellant, was appointed trustee.

On the 11th of June the lessor distrained upon the goods of *Richardson* for arrears of rent, and also for one half year's rent in advance in respect of an adjoining farm called *Pasture Fields*, of which the debtor was also tenant under a lease dated the 13th of August, 1879.

On the 22nd of July the lessor demanded of the trustee immediate possession of the *Churchrigg Farm*. The trustee in reply disclaimed the *Pasture Fields Farm* (held under the lease of August, 1879), and stated that he was ready to give up possession of *Churchrigg Farm* if the lessor would pay for the crop then growing on the farm at a valuation. The lessor, by his solicitors, declined to pay any valuation of the crops and threatened proceedings to recover possession.

Pursuant to this intimation, the trustee was on the 29th of

C. J. B. 1880 *In re* RICHARDSON. *Ex parte* HARRIS.

July served with a writ in an action of ejectment, which action is still pending.

On the 3rd of August, 1880, in consequence of a letter of that date from the lessor demanding, under threat of an immediate distress, payment in advance of the half year's rent for *Churchrigg Farm* falling due on the 2nd of February, 1881, the amount, less 5 per cent. discount, was paid by the trustee.

On the 11th of August, 1880, the lessor served the trustee with notice, under the *Bankruptcy Act*, 1869, s. 24, calling upon him to decide within twenty-eight days from the date thereof whether he would or would not disclaim all interest under the lease of *Churchrigg Farm*. A case on behalf of the trustee was laid before counsel, but owing to absence during the Long Vacation, the opinion was not received until after the expiration of the twenty-eight days limited by sect. 24.

On the 11th of September notice was served upon the trustee not to sell or remove any of the hay and turnips growing on *Churchrigg Farm*.

On the 25th of September the trustee wrote inquiring whether the lessor would accept of *Churchrigg Farm* on the 2nd of February, 1881. The terms stated by the lessor as those on which only he would consent to accept the farm, on the 2nd of February, 1881, being considered unreasonable and quite impossible, the trustee, on the 4th of October, served the lessor with notice of application to the County Court for liberty, as from the 2nd of February, 1881, to which date rent had been paid in advance, to disclaim all interest in *Churchrigg Farm*.

On the hearing of that application, the Registrar, being of opinion that he had no power under the *Bankruptcy Act*, 1869, s. 24, to grant it, dismissed the application, but refused costs to the lessor.

The trustee now appealed.

Crompton, in support of the appeal :—

The twenty-eight days within which the trustee, by the *Bankruptcy Act*, 1869, s. 24, is called upon to decide whether he will disclaim or not, is not an absolute statutory term, but may be enlarged by the Court if the lessor has done anything to put the

trustee off his guard, or there are special circumstances to excuse the delay: *Ex parte Lovering* (1); or if the lessor by his conduct has waived the right of insisting upon a strict compliance with the terms of sect. 24: *Ex parte Moore* (2). In this case, as the landlord has enforced payment of rent in advance up to the 2nd of February, 1881, and has also given the trustee notice not to sell the crops of hay and turnips off the farm, he is not entitled to compel the trustee to make his decision before the 2nd of February, 1881.

E. Cooper Willis, for the Respondent, the lessor, was not called on.

BACON, C.J.:—

I am afraid the statute is too strong for me and for you, Mr. *Crompton*. It is not for me to endeavour to struggle against the statute, but there never, in my experience, has been a case in which it was more hard to hold that the statutory provision applies than the one now before us. However, it is my duty to administer the law as well as I can. The fact that the rent was payable in advance cannot make any difference. The parties, who were perfectly competent to contract, did agree that the rent under this lease should be payable in advance. The words of sect. 24 are plain. Twenty-eight days is the period fixed within which the trustee can make up his mind whether he will or will not disclaim. The statute enables the Court in a proper case to enlarge that time, especially if the application is made before the expiration of the twenty-eight days, and also if there are circumstances from which the Court can infer that the lessor did not intend, and gave his opponent reasonable ground to believe he did not intend, strictly to enforce the statutory provision. I should be very glad if I could find that the circumstances of the case would enable me to apply that relaxation of the rule, but I cannot take into consideration what has been urged as to the unfairness, *i.e.*, the hardness, of the transaction, because nothing can be called unfair which is the result of a bargain between the parties. In all cases, unless it can be shewn that the trustee has been misled,

(1) Law Rep. 9 Ch. 586. (2) 2 Ch. D. 802.

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or induced to rely on an apparent forbearance, this rule must apply. Within the twenty-eight days there was plenty of time for the trustee to have applied to the Court of Bankruptcy to extend the time, and on the grounds which have been urged on me I have no doubt that the Court would have attended to the application. He might have been allowed, in the month of August, to get in the crops, and it would have given him an opportunity of getting some terms of sale for the acts of husbandry, if there were any, or the outgoing tenant's rights. Unfortunately, he allowed the time to elapse. Certain cases have been referred to in which, not the decisions, but the expressions of the Judges do relax the severity of the rule as far as could be done. But here I can find no reason why, between the 11th of August, which was the day on which the trustee was required to elect within twenty-eight days, and the 11th of September, nothing was done. Nothing seems to have been done until later than that. There is nothing in this case, therefore, which would bring it within the relaxation of the rule which *Ex parte Lovering* (1) and *Ex parte Moore* (2) would allow me to apply to this case.

Appeal dismissed. No costs given to the Respondent.

Solicitors: *Johnston & Harrison*, agents for *Jamieson & McKeever, Wigton.*

(1) Law Rep. 9 Ch. 586. (2) 2 Ch. D. 802.

Ex parte FULLER. *In re* LONG.

C. J. B.
1881
Feb. 7.

Solicitor—Lien for Costs—Title Deeds deposited by Mortgagee with Solicitor—Subsequent Employment of Solicitor by Mortgagor.

A mortgage deed and the title deeds to the mortgaged property were deposited by the mortgagees with their solicitors for safe custody. Afterwards the mortgagor instructed the same solicitors to sell the property, and they employed an auctioneer for the purpose, and made use of the deeds in preparing particulars and conditions of sale. The property was put up for sale, but was not sold. The mortgagor then filed a liquidation petition, and the trustee contracted to sell the mortgaged property:—

Held, that the solicitors had no lien on the deeds as against the trustee in respect of their costs of the abortive sale.

THIS was an appeal from a decision of the Judge of the *Bristol* County Court.

On the 17th of January, 1880, *A. R. Long*, a yeoman at *Blagdon*, in *Somersetshire*, executed a mortgage of some freehold property there to *E. R. Fuller* and *F. W. Fuller*, to secure the repayment of £1150 and interest, and the mortgage deed and the title deeds of the property were handed to Messrs. *Payne & Fuller*, the solicitors of the mortgagees, on their behalf. The solicitors retained the custody of the deeds for the mortgagees. In February, 1880, *Long* executed a second mortgage of the property to the *Newnham Gas Company*, to secure £150 and interest. On the 6th of May, 1880, *Long* called on Messrs. *Payne & Fuller*, and stated that he was in embarrassed circumstances, and instructed them to act for him as his solicitors in endeavouring to effect a settlement with his creditors, and for this purpose to sell the mortgaged property and certain other property by auction. Messrs. *Payne & Fuller* then applied to the first and second mortgagees and obtained their consent to join in the sale and receive the amounts due to them without insisting upon six months' notice. *Payne & Fuller* then instructed some auctioneers to put up the property for sale, and they also prepared particulars and conditions of sale, for which purpose they made use of the title deeds which were in their custody. The property was put up for sale accordingly, but it was not sold, as no bidding was made up to the

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reserved price. In consequence of this failure to sell, it was found impossible to make any arrangement with *Long's* creditors, and, on the 23rd of June, 1880, he filed a liquidation petition. The trustee in the liquidation sold the mortgaged property. The second mortgagees were paid off by the trustee, and the first mortgagees executed a reconveyance, and were ready, so far as they were concerned, to hand over the deeds, on receiving what was due to them on their mortgage. But *Payne & Fuller* claimed a lien on the deeds as against the mortgagor for the sum of £49 15*s.*, being their costs in relation to the abortive sale and the attempt to arrange with the mortgagor's creditors. Notice of this claim was given to the first mortgagees. The purchaser's solicitor refused to complete the purchase on hearing of the claim to a lien. The trustee applied to the County Court for an order that the deeds should be handed over to him on payment of what was due to the first mortgagees. The Judge held that *Payne & Fuller* were not entitled to the lien which they claimed, and ordered the deeds to be delivered up on payment of what should be found due to the first mortgagees. And he ordered the trustee's costs of the application to be paid by the first mortgagees and the solicitors.

The first mortgagees and the solicitors appealed.

Horton Smith, Q.C., and *Northmore Lawrence*, for the Appellants :—

The fact that the mortgagor came to the solicitors and instructed them to act for him in relation to the mortgaged property, gave them a lien upon the deeds, subject to the rights of the mortgagee: *In re Mosely* (1). The lien is a general one: *Colmer* v. *Ede* (2). In that case Vice-Chancellor *Stuart* followed the decision of Lord *Eldon* in *Ex parte Sterling* (3). The client cannot give his solicitor a lien on anything more than his own interest in the property: *Pelly* v. *Wathen* (4); *Smith* v. *Chichester* (5).

But the solicitor's lien is good as against a subsequent incumbrancer until he has notice of that incumbrance: *Blunden* v.

(1) 15 W. R. 975.
(2) 40 L. J. (Ch.) 185.
(3) 16 Ves. 258.
(4) 7 Hare, 351; 1 D. M. & G. 16.
(5) 2 D. & War. 393.

Desart (1). The lien is good as against the assignee in bankruptcy of the client: *Lambert* v. *Buckmaster* (2). The principle for which we contend was recognised by your Lordship in *Ex parte Calvert* (3). The costs in question were incurred before the liquidation, and, therefore, the trustee clearly takes the property subject to the lien of the solicitor.

Winslow, Q.C., and *C. J. Ruscombe Poole*, for the trustee, were not heard.

BACON, C.J.:—

I cannot think that any lien exists in this case; the cases which have been cited to me are no authority for it. The plain law is this, that a lien can only exist where there is a lawful possession of the thing upon which it is claimed by the person who claims it. What rightful possession of the deeds had the solicitors in the present case? The deeds were the deeds of the mortgagees, and they were placed in the solicitors' hands only for safe custody. The solicitors had the deeds in their possession, not in any right of their own; their possession was that of the mortgagees, and nothing more. They trusted the mortgagor like any ordinary creditor, and had no right to change their position into that of secured creditors because they happened to have the deeds of some other client in their possession. No lien can attach on that which never was held by the solicitors by contract or in any other way as solicitors of the persons against whom the lien is claimed. I am of opinion that the Appellants had no lien as against the mortgagor by virtue of their accidental possession of the deeds. I dismiss the appeal, but I give no costs.

Solicitors for Appellants: *Torr & Co.*, agents for *Payne & Fuller, Bath.*

Solicitor for Trustee: *C. Sawbridge*, agent for *F. J. Blake, Wotton-under-Edge.*

(1) 2 D. & War. 405, 428.
(2) 2 B. & C. 616.
(3) 3 Ch. D. 317.

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Ex parte BLYTHE. *In re* BLYTHE.

Proof in Bankruptcy—Partner—Administrator of Deceased Partner—Share of Deceased Partner's Capital retained in Business without Authority.

Three persons carried on business in partnership without any articles of partnership. The profits were divided between them in equal shares. After the death of one of them the survivors continued to carry on the business, retaining in it, without any authority, the deceased partner's share of the capital, and dividing the profits of the business between themselves equally. They afterwards filed a liquidation petition. There were still some joint debts of the partnership of the three remaining unpaid :—

Held, that the administratrix of the deceased partner could not prove in the liquidation in competition with his creditors in respect of his share of the capital.

Nanson v. *Gordon* (1) followed.

Ex parte Westcott (2) distinguished.

THIS was an appeal from a decision of the Judge of the *Liverpool* County Court.

J. C. Blythe, *Richard Blythe*, and *Walter Blythe* carried on business in partnership as steamship owners and brokers, at *Liverpool* and in *London*, under the firm of *Blythe Brothers*. The three partners were entitled to the profits of the business in equal shares, but there were no articles of partnership. *J. C. Blythe* died on the 22nd of September, 1875, intestate, and after his death the surviving partners continued to carry on the business under the same firm, dividing the profits among themselves in equal shares. No payment was made to the estate of *J. C. Blythe* in respect of his share in the capital of the business or of the profits arising therefrom. *Walter Blythe* took possession of some of the private assets of *J. C. Blythe* and paid some of his separate debts, but did not take out administration to his estate. In November, 1879, *Alice Blythe*, the widow of *J. C. Blythe*, obtained letters of administration to his estate. Afterwards *R.* and *W. Blythe* filed a liquidation petition. Mrs. *Blythe* tendered a proof in the liquidation for £7000, which she alleged to be due to the estate of her deceased husband in respect of his share in the capital of the firm. At the time when the proof was tendered

(1) 1 App. Cas. 195. (2) Law Rep. 9 Ch. 626.

there were some joint debts of the firm of which he had been a member still remaining unpaid. The trustee rejected the proof, and the Judge affirmed his decision, holding that the estate of *J. C. Blythe* could not prove in competition with his own creditors, and that the case was governed by *Nanson* v. *Gordon* (1).

Mrs. *Blythe* appealed.

Neville, for the Appellant:—

Nanson v. *Gordon* is distinguishable. There the deceased partner's share was retained by the survivors under the provisions of the partnership deed, and the House of Lords held that the ordinary rule as to proof by a partner applied equally to a proof on behalf of his estate made by his personal representative after his death. But in so doing the Court did not intend to disturb the exception to the rule which has been established in the case of a breach of trust, as, for instance, in *Ex parte Westcott* (2). The representative of a deceased partner is entitled to the benefit of that exception as much as the partner himself: *Ex parte Garland* (3); *Ex parte Butterfield* (4).

Ex parte Westcott was referred to with approval by the Court of Appeal in *Ex parte Gordon* (5). It was a breach of trust for the surviving partners to retain the deceased partner's share of the capital in the business.

W. R. Kennedy, for the trustee, was not heard.

BACON, C.J.:—

It appears to me that *Nanson* v. *Gordon* is in principle distinctly applicable to the present case. There still exist unpaid creditors of the firm of the three, and if the deceased partner were alive he could not prove in competition with them. His representative can stand in no better position. I cannot conceive that *Ex parte Westcott*, which was carefully explained by Lord Justice *James* in *Ex parte Gordon*, conflicts in the slightest degree with *Nanson* v. *Gordon*. In *Ex parte Westcott* the surviving partner had laid his

(1) 1 App. Cas. 195.
(2) Law Rep. 9 Ch. 626.
(3) 10 Ves. 110.
(4) De G. 570.
(5) Law Rep. 10 Ch. 160, 166.

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hands on assets of the deceased partner which were not part of the joint estate, and had employed them in carrying on the business; that was a devastavit, and the estate of the deceased partner was allowed to prove against the estate of the surviving partner for the assets which had been thus improperly employed. But that has no application to the present case. It is an admitted fact that there are unpaid debts of the firm of the three, and the creditors of the three have a right to prove in the liquidation. It cannot be reconciled with any principle that their debtor's estate should come and prove in competition with them. If the Appellant has any claim at all it would be founded on this, that on a dissolution of the partnership the assets would be enough to pay the debts in full and leave a surplus beyond. She never attempted to set up this claim before the liquidation. There is no shadow of a distinction between this case and *Nanson* v. *Gordon* (1), and the Judge of the County Court was quite right in saying, as he did, So long as there are debts of the three unpaid, I will not permit the representative of one of them to prove in competition with their creditors.

Solicitors for Appellant: *Last & Sons*, agents for *Barrell, Rodway, & Barrell, Liverpool.*

Solicitors for Trustee: *Sharpe, Parkers, & Co.*, agents for *Gill & Archer, Liverpool.*

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Liquidation by Arrangement—Subsequent Resolution of Creditors to accept Composition—Approval of Court—Judicial Discretion—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 28, 126.

In giving or withholding the approval of the Court to a composition with creditors, accepted by the proper majority under sect. 28 of the *Bankruptcy Act*, 1869, the Judge is exercising a judicial discretion, and is bound to consider the objections brought before him by a dissentient creditor, and to give his decision judicially upon sufficient reasons.

The power of the Court under sect. 28 is not limited, as in the case of a composition accepted by the resolution of two meetings of creditors under sect. 126, to setting aside the resolution on the ground of fraud in the proceedings.

The propriety of the resolutions is to be judged of by the Court upon the facts as they appear at the time when its approval is sought, not as they appeared at the time when the resolutions were passed.

The exercise of the discretion by the Judge is subject to appeal, but the Court of Appeal ought not to interfere unless it is clearly shewn that the Judge has exercised his discretion wrongly.

Decision of *Bacon*, C.J., reversed.

The fact that by composition resolutions under sect. 28 no security was given for some of the instalments, and the management of the assets was intrusted to a debtor who for several years previously had indulged in recklessly extravagant expenditure:—

Held, to be a sufficient reason for refusing to give the approval of the Court to the resolutions.

CHARLES DURHAM, *Vernon Cochrane*, *Barton Grindrod*, and *William Hector* carried on business in partnership as merchants in *London*, and at *Manchester*, under the firm of *Durham & Co.*, at *Rio de Janeiro*, under the firm of *Charles Durham & Co.*, and at *Colombo*, in *Ceylon*, under the firm of *Durham, Grindrod, & Co.* The business consisted principally in exporting *Manchester* goods and hardware. The *Rio* business was managed by *Hector*, and the *Colombo* business by *Grindrod*. On the 26th of August, 1880, the firm stopped payment, and, after an ineffectual attempt to make an arrangement with their creditors, they on the 8th of November filed a liquidation petition. The first meeting of the creditors was held on the 3rd of December, and by the statement of

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the debtors' affairs then produced, which was dated the 6th of November, it appeared that the unsecured liabilities of the firm amounted to £153,740 12*s.* 1*d.*, and that their assets were estimated as worth £99,724 9*s.* 1*d.* Among the assets was an item "Property as per list G. £44,175." By the list G. it appeared that *Hector*, the resident partner at *Rio*, had on the 26th of August sent a statement to the firm in *England* in which he estimated the value of the assets of the firm at *Rio* (taking the exchange at the then rate of 23¼*d.* per milrea) at £100,552. From that he had deducted for liabilities and drafts to be returned £40,565, leaving a surplus of £60,987. From this sum the debtors in list G. deducted, in order to reduce the surplus to an exchange of 21*d.*, which had been the average exchange for the year 1879, £5902, leaving a balance of £55,085. They then made these further deductions:—

Estimated loss on hardware account . .	£3000
Do. goods account . .	3000
And for expenses of realization . .	5000
Total	£11,000

thus reducing the *Rio* surplus to £44,085. Adding to this £90, the surrender value of a policy of insurance on the life of one of the partners, the total amount of property was shewn to be £44,175. Another item in the statement of assets was £4245 3*s.* 7*d.*, the estimated surplus from the separate estate of *Durham*.

In the list of unsecured creditors the *Merchant Banking Company of London* were entered as creditors for £26,000. The executors of *W. Durham* (the father of *Charles Durham*, and a former partner in the firm) were entered as creditors for £46,661 18*s.* 1*d.*, less a payment of £6000 to them on the 23rd of August, leaving £40,661 18*s.* 1*d.* *Charles Durham* and two gentlemen named *Openshaw* and *Delmar*, who were his brothers-in-law, were the executors. *Charles Durham* took under his father's will a considerable interest in the residue of his estate. The father died in January, 1880. The £46,661 18*s.* 1*d.* consisted mainly of moneys which the father had from time to time lent to the firm at interest after his retirement from it, and inte-

rest on the loans, but *Charles Durham* had in June, 1880, deposited with the firm a further sum of £4000 belonging to the estate, and had in so doing committed a breach of trust. Another creditor for more than £20,000 was Mrs. *Perrin*, the widow of a former partner in the firm.

By the statement which *Durham* produced of his separate assets and debts, it appeared that his furniture was worth about £7500.

The creditors at this meeting resolved upon a liquidation by arrangement, and appointed Mr. *Adam Murray*, an accountant at *Manchester*, trustee. A committee of inspection, consisting of five members, was also appointed, one of whom, a Mr. *Angus*, represented the *Merchant Banking Company*. Messrs. *Sale & Co.*, of *Manchester*, who were the debtors' solicitors, were appointed solicitors to the trustee. Shortly afterwards *Durham* and *Cochrane* made an offer to the trustee to purchase the assets of the firm, on the terms of paying the creditors a composition of 10*s.* in the pound in four instalments of 2*s.* 6*d.* each, the first in cash immediately, and the other three in six, twelve, and eighteen months respectively, security being given for the last instalment only. The trustee summoned a meeting of the creditors, to be held on the 23rd of December, under the provisions of sect. 28 of the *Bankruptcy Act*, 1869, to consider this proposal. On the 22nd of December *Durham* was examined before the Registrar of the *Manchester* County Court by counsel on behalf of the *Merchant Banking Company*. From his examination it appeared that in 1875 he had applied to the *Merchant Banking Company* for credit, and had then represented to them that he had a capital of £100,000. Of this sum about £80,000 was his share of the capital of the firm, and the remaining £20,000 consisted of furniture and other private property. In 1875 he had furniture worth £15,000 in a house in *Wales*, where he then lived. In that year he took a lease of a house and land, called *Aldenham Abbey*, near *Watford*, at a rent of £800 a year, and laid out £40,000 in furniture and decorations, in addition to the furniture which he previously possessed, and which was removed from *Wales* to the new house. This sum was paid by means of withdrawals from the business. He also admitted that his private expenditure during the five years from 1875 to

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1880, had been at the rate of at least £5000 a year (in addition to the £40,000), and that his total drawings from the firm in that period had been about £80,000. During the same period of five years the total net profits of the firm had been only £10,000, or at the average rate of £2000 a year, of which he was entitled to one half. He also stated that his furniture and other effects at *Aldenham Abbey* had been recently sold for about £11,000, from which a deduction would have to be made for auctioneer's charges and other expenses. Furniture worth about £1000 had also been removed to another house. He further stated that at the time of his father's death the amount owing to him by the firm was £42,000. He also stated that he (*Charles Durham*) was, in June, 1880, going to *Rio*, and that he, before his departure, deposited a further sum of £4000 belonging to his father's estate, which was in his hands, with the firm as a temporary loan. This was a breach of trust. On the 23rd of August, after his return to *England*, he took some bills of the firm to a bank and discounted them, and paid the proceeds, amounting to £6000, into another bank to the credit of an account of his father's executors. The £6000 was intended to repay the £4000, and part of the original debt to the father's estate. He admitted that at this time the firm were hard up for money, and that they were compelled to stop payment on the 26th of August because their bankers would advance them no more money. He admitted also that he was the acting trustee of his father's estate, and that his co-trustees did not interfere, and that no one had said anything to him about repaying the £6000. He admitted that he had committed some other breaches of trust by lending trust moneys to the firm.

At the meeting on the 23rd of December the solicitor of the *Merchant Banking Company* attended and opposed the acceptance of the debtors' offer, on the ground that the assets were sufficient to pay a composition of at least 12*s.* 6*d.* in the pound. And he stated that the banking company were willing themselves to buy the whole of the joint assets on the terms of paying the creditors a composition of 10*s.* 6*d.* in the pound, payable in four equal instalments at the same dates as those which were proposed by the debtors, or, if the creditors preferred it, to make an immediate cash payment of 10*s.* 2*d.* in the pound. Mr. *Cobbett*, a solicitor,

who was present at the meeting on behalf of (among other creditors) the executors of Mr. *Durham*, told the meeting that the additional 6*d.* in the pound was not sufficient to induce the creditors to accept the offer of the bank, and thus take so large a firm as that of the debtors off the *Manchester* market. Some reference was made by the solicitor of the banking company to the fact that *Durham* had been examined on the previous day, but the notes of his examination were not read to the meeting. The creditors resolved, by the proper statutory majority, to accept the offer of the debtors, the banking company and another creditor for a small sum being the only dissentients. The resolutions passed were to the following effect :—

1. "That the sanction of the creditors be and the same is hereby given to the acceptance by the trustee of an offer for the purchase of the whole of the property, estate, and effects of the debtors distributable among the joint creditors, made by *Charles Durham* and *V. Cochrane*, two of the debtors, upon the following terms and conditions and for the following consideration, that is to say, the purchasers to pay all the costs of and incident to the proceedings for liquidation, and also all preferential claims under the proceedings, and also to pay to all and every the joint creditors of the debtors a composition upon their debts of 10*s.* in the pound, payable by the following instalments, viz., 2*s.* 6*d.* in the pound in cash on the 31st of January, 1881, provided that the approval of the Court be obtained thereto in the meantime, but, if such approval shall not then have been obtained, then within seven days from the date of such approval being obtained; the further sum of 2*s.* 6*d.* in the pound in six calendar months from the 31st of January, 1881; the further sum of 2*s.* 6*d* in the pound in twelve calendar months from the same date; and the remaining sum of 2*s.* 6*d.* in the pound in eighteen calendar months from the same date, the last instalment to be secured to the satisfaction of the committee of inspection or a majority thereof.

2. "That the discharge of the debtors be and the same is hereby granted.

3. "That the accounts of the trustee be audited by the committee of inspection.

4 and 5. "That the close of the liquidation shall take place,

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and the trustee be released on and from the 29th of September, 1882."

Application was then made by the trustee to the Judge of the County Court for his approval. On the hearing of this application, the examination of *Durham*, the statement of affairs, a transcript of a shorthand writer's notes of the proceedings at the meeting of the 23rd of December, and other evidence, were before the Court. The Judge, without expressing any opinion upon the other points which were raised, refused to approve the resolutions, simply on the ground that the estate was to be handed over to the debtors for 10*s.* in the pound without any security, except for the last instalment.

The trustee appealed to the Chief Judge.

The appeal was heard on the 17th of January, 1881.

Winslow, Q.C., and *Jordan*, for the trustee :—

There may be good reasons why commercial men should desire that the business of their debtors should be sold to the debtors themselves, rather than to a banking company. Creditors are not bound to accept the offer of the highest bidder. It was not intended by sect. 28 to give to the Judge a discretionary power. He is not to exercise an independent opinion on the merits of a composition or of a scheme. He has to see that the proceedings have been regular, and that there has been no fraud, or unfair conduct. He has no right to interfere with the discretion of the creditors, fairly exercised. In this case, all the creditors were well informed persons, perfectly qualified to take care of their own interests. They were better informed than the Court can possibly be of what was to their interest.

In the absence of *mala fides* the Court will not interfere with a composition arrangement, even if it should be beneficial to the debtor: *Ex parte Linsley* (1); *Ex parte Cowen* (2).

De Gex, Q.C., and *S. Taylor*, for the bank :—

There is a distinction between the 126th and the 28th sections. The 126th section gives, as sect. 192 of the *Bankruptcy Act*, 1861,

(1) Law Rep. 9 Ch. 290. (2) Law Rep. 2 Ch. 563, 569.

gave, to the creditors an uncontrolled power of deciding what amount of composition shall be accepted. The meeting must be duly held, and the resolution must be passed by the requisite majority, and that is all. But under the 28th section, which applies only where there has been either an adjudication in bankruptcy or a liquidation, each creditor gains an absolute right to an aliquot part of the assets, proportional in amount to his debt. The trustee holds the estate for the benefit of each creditor; and one creditor or 1000 creditors are not to control the rights of another creditor, except under the express terms of the statute. It is not sufficient that a majority should think the composition desirable; it is necessary that the Court also should approve it. *Ex parte Linsley* (1) was a decision under the 126th section. The trustee himself does not say that the debtors' offer was the best bargain for the creditors, and obviously it was not. The offer of the bank was a better one. Lord *Cairns*, in *Ex parte Cowen* (2), expressly says that if the creditors, from motives of benevolence, even without fraud, are willing to give the debtor a discharge on payment of a composition wholly disproportionate to his assets, the bargain will not be binding on the minority.

To the validity of a composition it is necessary that it be passed for the benefit of all the creditors, and not for the benefit of the debtor: *Ex parte Lennard* (3); *Ex parte Terrell* (4). These resolutions were clearly passed in the interest of the debtors.

BACON, C.J.:—

In my opinion the order of the County Court Judge cannot be sustained.

It has been said that there is some distinction between the 126th and the 28th sections of the Act, but there is no distinction between the principles that govern the two sections. When a man presents a petition for liquidation, he commits an act of bankruptcy. If a man offers a composition to his creditors, and they decline it, then the estate must be administered in bankruptcy. But if they afterwards choose to accept a composition, then the case comes within the 28th section; and to the extent

(1) Law Rep. 9 Ch. 290.
(2) Ibid. 2 Ch. 570.
(3) 33 L. T. (N.S.) 553.
(4) 4 Ch. D. 293.

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to which the Court has any power given to it by the 28th section, it may be said that the language of the 28th and of the 126th sections is inconsistent. But if a composition be accepted by creditors which is tainted with fraud in any way, it would be void, and there is nothing to prevent the Court of Bankruptcy from exercising its authority over it, although it would not have recourse to the 28th section for the purpose of justifying its action. So that, as far as the principle goes, for the present purpose, there is no distinction between the 28th and the 126th sections. The 28th section deals with a bankruptcy which is existing, and which is directly under the attention of the Court, but the principle contained in the section is that which pervades the whole of the administration in bankruptcy, viz., that the majority shall have power to bind the minority in every case, unless fraud can be imputed. There is no part of the Act of Parliament, and no feature in the administration of bankruptcy, which says that the voice of a creditor, voting in a minority, shall be heard against a resolution of a majority. In this case, it has not been suggested that there has been any fraud. There has been no suggestion of bad faith. The 126th section gives to the creditors power in their own private rooms or counting-houses to settle their affairs for themselves, without asking the sanction or superintendence of the Court. The 28th section provides that when the whole of the bankrupt's estate has been taken possession of by the law for the purpose of making an equal division of the estate among the creditors, no creditor entitled to an aliquot share of the estate is entitled to obstruct any kind of arrangement proposed, provided that nothing unlawful is done, and that the rights and interests of the creditors in general are not relinquished or abandoned. The Court can protect its own proceedings, and see that nothing fraudulent is done, but it has no authority to say to forty out of forty-two men that they have taken an erroneous view of their interests, and that they are not to be at liberty to take 10*s.* in the pound, because 10*s.* 2*d.* can be got for them. There is no principle, reason, or authority suggested why the unquestionable power of the majority to decide upon what is best for their interests should be overruled by the Court, on any notion that the Court can make a better bargain for them than they can make for themselves.

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As I understand, when the matter came before the learned Judge, a composition was offered to be paid in four instalments, two of which were unsecured. Upon that ground alone the learned Judge's judgment proceeded. There is no reason—nothing in the Act of Parliament or rules—which makes it necessary that the creditors, before coming to such a resolution, should be obliged to have security. The 280th rule says that the creditors "may" resolve that the composition shall be secured "in such manner as may be approved by" the creditors. The mode of doing that rests with the creditors themselves, and not with the Court; and the Court has, I conceive, no authority under the statute to refuse to register resolutions on that ground.

If the *Merchant Banking Company* were resolved to make this offer, they should have required another meeting to be held, and then they should have made the offer in some such way as that when made it would have been binding. But there was nothing of the kind here. There was nothing to prevent the *Merchant Banking Company*, after they had frustrated the proceedings of the meeting, changing their minds and saying, "We will give you neither 10*s.* 2*d.*, nor anything else." No offer in good faith, so far as I know, was ever made by the *Merchant Banking Company*, and yet that is the whole of the argument that has been pressed upon me, beyond the fact that 10*s.* 2*d.* is more than 10*s.*

The object of this transaction clearly was that these merchants should be restored to their position, and should be able to carry on their business, which it was essential they should do, in order that they might have the means of paying the two unsecured instalments of the composition. It is said that the creditors are so blind to their own interests as to refuse to take 10*s.* 2*d.*, and to accept 10*s.* Of these creditors, some are said to be relatives, many of them are men of business. It was their object, I may reasonably assume, that these large merchants should be restored to their position, in which position transactions would arise that would be as beneficial to the creditors as if they had not become bankrupt, or, at all events, beneficial to them. Their co-traders desired that they should be placed in the position in which they could carry on the trade in which they were all interested. There is nothing unreasonable in that. The debtors have a number of creditors

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who are full of friendly disposition towards them, and there is no law to prevent the exercise of that friendly feeling, provided the rights of other persons who are not actuated by such motives are not prejudiced. The order of the County Court must be discharged, and the *Banking Company* must pay the costs.

From this decision the bank appealed. The appeal was heard on the 10th and 11th of February, 1881.

Benjamin, Q.C., *S. Taylor*, and *Cabell*, for the Appellants:—

There is a marked distinction between sect. 28 and sect. 126. Under sect. 126 a composition must be approved by two meetings of the creditors, and the second meeting may reject what the first has approved. Under sect. 28 there is to be only one meeting of the creditors, and what they determine upon is to be "subject to the approval of the Court." The Judge has a judicial discretion to sanction or withhold his sanction from the resolution of the creditors; his power to set aside the determination of the creditors is not limited, as it is under sect. 126, to cases where there has been fraud in the proceedings. He has to see whether the proposed arrangement is a fair and proper one having regard to all the circumstances. At any rate, the exercise of his discretion by the Judge of the County Court should not be lightly interfered with. But in the present case the circumstances are such as fully to justify his refusal to sanction the composition. We do not say that there has been any actual fraud or corruption; but the debtors, their family connections, and the trustee have combined to oppress the minority. The trustee has not been faithful to his trust; he has endeavoured to favour the debtors at our expense. The offer of the bank must have been refused in the interest of the debtors, not in that of the creditors. We are still ready to carry out the offer, if the creditors wish it, but we are quite content that the liquidation should proceed in the ordinary way.

Sir *F. Herschell*, S.G., *Winslow*, Q.C., and *C. E. Jones*, for the trustee:—

Having regard to the large expenses of an ordinary liquidation,

it might well be prudent for the creditors to accept 10*s.* in the pound. Certainly, the trustee's own interest was that the liquidation should continue. The policy of the *Bankruptcy Act* is to leave the determination of such matters to the creditors, to make them the judges of what is best for their own interests. They are better judges than the Court can possibly be of the value of the assets. But, whatever may be the power of the Court to overrule the decision of the creditors, it ought not to be exercised except on the most substantial grounds. The approval of the proposed arrangement by the statutory majority of the creditors is a very substantial reason for the Court giving its approval.

[JAMES, L.J.:—In sect. 28 the Court is substituted for the second meeting of creditors under sect. 126; surely the Court may do what the second meeting could do.]

The County Court Judge declined to give his approval, only because no security was to be given for the second and third instalments of the composition.

[JESSEL, M.R.:—He meant that he would not hand over the assets without security to persons who had shewn themselves so extravagant.]

As to the payment of £6000 which has been called a fraudulent preference, it was the duty of the debtor to replace the money, and it could make no difference to the creditors, for, the claim being in respect of a breach of trust, the persons interested in the money could prove at their election against either the joint estate or the separate estate of *Durham*. And, there being a considerable surplus of the separate estate, they would get paid the £6000 in full, and thus diminish to that extent the surplus which would go over to the joint estate. The approval of the Court under sect. 28 is not a substitute for the second meeting of creditors in the case of an ordinary composition under sect. 126. Proceedings either for liquidation by arrangement or composition are commenced in the same way, by the filing of a petition by the debtor. He must produce a statement of his affairs at the first meeting of his creditors, and they can examine him at the meeting: *Bankruptcy Act*, 1869, sect. 125, sub-sect. 3. If they pass resolutions for liquidation by arrangement, that is conclusive evidence that he

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has complied with the provisions of the statute with regard to the statement of his affairs: Rule 301; *Ex parte Walter* (1).

[JAMES, L.J.:—It is not conclusive that the statement is accurate; but only that the debtor has complied with the requirements of the Act. It is conclusive evidence that the debtor is truthful; not that his statement is true.

JESSEL, M.R.:—Fraud is not necessary, mistake would be a sufficient objection. Rule 301 only makes the debtor's statement *primâ facie* evidence. Suppose the debtor was examined and admitted that he had made a mistake of £50,000 in his assets? The statement clearly does not bind the creditors as to the amount of their debts, and it must have the same effect with regard to the assets as with regard to the debts. Rule 301 only defines the duty of the Registrar on an application to register the resolutions.]

At any rate it does not follow that the creditors were not acting *bonâ fide*, because they accepted a composition less than the debtors' statement shewed that the assets would pay. In *Ex parte Linsley* (2) it was held that creditors were justified in accepting a composition of 10*s.* in the pound, though the debtor's statement shewed that his assets would pay 20*s.* The Court will have regard to the wishes of the creditors: *Ex parte Cowen* (3). In the present case the Appellants are really the only dissentient creditors. Full information was given to the creditors at the first meeting. The judgment of the County Court Judge was practically in our favour on every point but one, and that point, viz., the fact that no security was offered for the second and third instalments of the composition, is not a sufficient reason for overruling the determination of the creditors.

JESSEL, M.R.:—

This appeal raises questions both of law and of fact. As regards the question of law the Chief Judge was of opinion that the 28th section of the *Bankruptcy Act*, 1869, which requires the approval of the Court to be given to a composition effected under a liqui-

(1) 2 Ch. D. 326. (2) Law Rep. 9 Ch. 290.
(3) Law Rep. 2 Ch. 563.

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dation by arrangement, compelled him to give that approval unless fraud were shewn, and he likened it to cases under the 126th section of the same Act, where a composition arrangement had been approved by two meetings of creditors, in which case, no doubt, there are decisions that fraud must be shewn in order to destroy the effect of the resolutions of the two meetings. It appears to me that as a matter of law that decision was erroneous. The words of the 28th section are clear—that the resolution of the creditors "is subject, nevertheless, to the approval of the Court." There are no terms of approval laid down in the section, but the obtaining of the approval or the sanction of the Court to some proceeding is a matter very familiar to all Courts, and more especially to the Judges of the Chancery Division. Inasmuch as they have administrative duties to perform, there are no Judges who are more frequently called upon to approve or sanction arrangements. In sect. 1 of the *Joint Stock Companies Arrangement Act*, 1870 (33 & 34 Vict. c. 104), the words used are almost the same, the sanction of the Court to a compromise with creditors may be given after a resolution of the creditors passed by the same statutory majority as under the *Bankruptcy Act*. I never heard the proposition doubted that where the approval or sanction of the Court is required—whether in an administration suit on behalf of infants or persons incapacitated, or in a partnership suit where there is a sale of assets, or under the Companies Acts, where it is of constant occurrence to sell assets or to approve of arrangements—that it is the duty of the Judge fairly to investigate the objections brought before him to the proposed arrangements, and to give his opinion upon them judicially, of course, and with sufficient reasons. I never heard that proposition doubted. Therefore, on general principles, unless there is some decision to the contrary, I should say that this section means what it says, that the resolution of the creditors is to be subject to the approval of the Court, to be given or withheld according to the weight and sufficiency of the reasons which are brought before the Judge to induce him to give or withhold that approval. In other words, it is the exercise of a judicial discretion, which means a discretion founded on sufficient reasons. And, like every other such discretion, the exercise of it is subject to appeal, but

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the Court of Appeal will not be ready to interfere with the Judge's exercise of his discretion unless it is shewn that he was clearly wrong. That I should say is the clear meaning of the section, and it is only necessary to refer to the 126th section to shew that the decisions upon it can have no bearing on the question what is the proper meaning of the 28th section. Under sect. 126 there are two meetings of creditors, and the second meeting may or may not confirm that which the first has done. Under the 28th section there is but one meeting, and the Court, so to say, as has been already observed by Lord Justice *James*, is in a somewhat similar position to the second meeting of creditors with regard to the confirmation of what has been done. It may well be that the second meeting may investigate everything which has been done, and may be of opinion that there has been a mistake, or there may be a subsequent discovery of important matters which will induce the second meeting to withhold its confirmation of the resolutions passed at the first meeting. Why should not similar reasons be brought before the Court when it is asked to confirm or approve that which was done at the only meeting? It appears to me, therefore, that the decisions upon the 126th section have no direct bearing upon the construction of the 28th section.

That being so, and being of opinion that the County Court Judge had a discretion to exercise, I now come to the second question—whether his decision was so wrong, so clearly wrong, that it behoves the Court of Appeal to reverse what he has done. On this point we have not the assistance of the Chief Judge, because he did not go into that question. He considered that in the absence of fraud the County Court Judge had no discretion to exercise, and he gave no opinion as to whether he had exercised his discretion wisely or not. As regards the case before us, it appears to me that whether I should or should not, as a Judge of first instance, have arrived at the same conclusion as the Judge of the County Court, I should not be prepared to say that he arrived at an erroneous conclusion, but, in common fairness to that learned Judge, I think I ought to say that I myself, if I had been sitting in the first instance, should have arrived at the same conclusion as he did. [His Lordship then referred to some of the facts, and in particular to the extravagant expenditure of Mr. *Charles*

Durham during the five years preceding the stoppage of the firm, and continued:—] There can, therefore, be no question whatever that he was guilty of reckless extravagance, without regard to the interests either of himself or of his creditors. It is evident that he was allowed by his partner, who must have known of his extravagance, to withdraw these immense sums from the business, and it had the effect, which might have been anticipated, of crippling the business, and probably leading to the ultimate failure, which took place in August last year. I dilate upon these facts because it is said by the Appellants that a man who was guilty of this reckless extravagance is not a person deserving of being intrusted with the future management or the custody of the assets. It is further said that the other partner who was associated with him in *England*, having allowed him to draw out these large sums with the knowledge of that extravagance, is not fit to be trusted either. I accede to this view. I think that a man who has so behaved is not fit to be trusted commercially.

But that is not the only charge made against this gentleman. It appears from his statement of affairs that there are at least three cases of breach of trust admitted by him—cases in which he has accepted a trust and has put into the business funds belonging to him in that character which he was not authorized so to invest. It is admitted that under the law which deals with breaches of trust those sums are provable at the election of the creditor against either the joint estate of the firm or the separate estate of *Charles Durham*. These, again, are circumstances not to be forgotten in estimating the man's character. But there is worse behind. He is charged with having been guilty of a gross and fraudulent preference in favour of members of his own family. [His Lordship stated the facts relating to the payment of the £6000.] I have no hesitation in acceding to the argument of Mr. *Benjamin* that this was a clear case of fraudulent preference. The only defence we have heard suggested is this, that if the accounts are looked into it will be found that there is a surplus of the separate estate to the extent of more than £4000, and, therefore, if the fraudulent preference had not been made—to the extent of £4000 at all events—the result would have been the same, as the creditor might, if he had so elected, have proved against the separate estate.

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Whether that argument is well-founded it is perhaps not necessary to consider. I am not sure that a creditor can split his claim and take part from one estate and part from another; but, assuming that argument to be well-founded, it does not bear upon the question. The conduct of Mr. *Durham* is the same whether his creditors do or do not lose by it. It appears to me that this charge has not been met at all; and, taking all these circumstances into account, I am clearly of opinion that he is not a fit person to be trusted with the custody of the assets, or with the disposal of them, without security. As regards the other English partner, he must have been aware of the withdrawals of the money. He must also have been aware of the breach of trust. I do not say he was aware—it would be unjust to say he was—of the fraudulent preference. It has not been shewn that he was; and I hope he was not; but still these are the only two persons whom it is proposed to intrust with the assets of the firm. [His Lordship then stated the resolutions of the creditors, and continued:—]

Now the position taken by the Appellants in reference to that arrangement is this. It is said, assuming the 2*s.* 6*d.* in cash to be paid immediately—which we will assume it would be—and assuming, which is admitted, that the security offered for the last instalment was satisfactory, there are two instalments at six and twelve months of 2*s.* 6*d.* in the pound which depend entirely upon the management of the business by these two gentlemen, and these two gentlemen we decline to trust. In my opinion that is a valid objection, and I think that the County Court Judge, in deciding that it was a valid objection, exercised a sound discretion. That was the only point which he decided, and it appears to me to be sufficient for the purpose.

But when the case came before us two other points were raised, both of which, I think, require very serious consideration. When I say they were raised before us, I do not mean that they were raised for the first time; they were raised by the affidavits before the Judge of the County Court, but he did not think it necessary to hear further argument, and he stopped the counsel for the bank. But they were properly raised before him, and they are properly brought before us on the appeal. The first point made was this: it is said that the state of the assets was

improperly described—that the assets are, in fact, very much larger than they appear in the statement of affairs, and that improper deductions have been made with the view of making them appear smaller than they actually are. Now that is a very serious charge; because the deductions could only have been made with the assent of the trustee and at the instigation of the debtors. The counsel for the Appellants did not shrink from saying that he accused the trustee of being unfaithful to his trust. I am not willing on the present occasion to say that I think this charge is fully proved. It is not necessary to say so, because it appears to me that the obligation of proof is not on the Appellants but on the Respondent. Those who come to a Court of Justice for its sanction or approval of an arrangement are bound to shew the Court that the arrangement is a fair and proper one, and are, in my opinion, bound to bring before the Court all the facts which are necessary in order to enable it to decide upon the fairness and propriety of the proposal. I will say this, that I am far from satisfied that the statement of affairs does disclose the real state of the assets. Without further explanation, I am of opinion that it would be impossible to approve of the proposal. To say the least, great doubt is thrown upon the truth of the statement, and I very much doubt whether the requisite care has been exercised by the trustee and his advisers in dealing with it. The statement, as it stands, shews nominally £153,740 12*s.* 1*d.* debts, and £99,724 9*s.* 1*d.* assets, giving roughly from 12*s.* 6*d.* to 13*s.* in the pound. The proposal was to take 10*s.* in the pound. If that had stood alone I should not have thought it at all unreasonable. We know very well that the costs of liquidation are serious, and that very likely not more than 10*s.* in the pound, perhaps not so much, would have been realized if matters had proceeded under the bankruptcy jurisdiction. Therefore that standing alone could not have been objected to. But it is said that the statement is erroneous in some most material particulars. [His Lordship referred to the estimate of the value of the *Rio* assets, and continued:—]

On the present evidence I think the deductions which have been made are not justifiable. Therefore, these assets have been improperly under-estimated, so far as the present evidence goes, and the Judge was quite at liberty either to refuse his sanction

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then and there, or to allow the case (supposing time and circumstances had permitted) to stand over for the production of further evidence. There is only one other item which I think is a very serious one. [His Lordship referred to the value set upon *Charles Durham's* furniture, and said:—] I cannot help saying, on the present evidence, that the value has been stated at least £4000 below the proper amount, and probably much more. There may be further evidence forthcoming to explain this discrepancy, but, as matters stand, it appears to me the under-statement was very considerable. That is a very material point. I think that when creditors are asked to sanction an arrangement of this kind there ought to be sufficient evidence before them to shew that the arrangement proposed is a fair one. It is said that this matter might have been brought before the meeting of creditors. I think there is an answer to that in the fact that it was only discovered at the examination of the debtor the day before. The notes of the examination were not at the meeting, though, no doubt, the solicitor of the bank, who was present at the meeting, might have recollected—probably would have recollected—a great deal of what had occurred.

There is a third matter which has impressed me very unfavourably. The Appellants say that in reality this was an arrangement made by the friends and relatives of the debtors to the prejudice of the creditors. £40,000 was the sum due to the father's estate, and it was, so to speak, in the hands of friends. Other sums were also due to members of the family, and others were due to *Manchester* connections. The offer of the debtors was 10*s.* in the pound, half secured and half unsecured. The Appellants, the *Merchant Banking Company*, said this: "We will give you 10*s.* 6*d.* in the pound, and if you don't like to take that at the dates offered by the debtors, we will pay you in cash, allowing the bank rate of discount, 10*s.* 2*d.*" In other words, they offered 10*s.* 2*d.* cash in lieu of 10*s.*, in four instalments—the first in cash, the second in six months, the third in twelve months, and the last in eighteen months. It seems to me impossible for anybody to argue that the offer of the bank was not more favourable to the creditors than the offer which was accepted, and it would be difficult to say on what

principle such an offer could be objected to. It is not suggested for a moment that it was not a *bonâ fide* offer, or that the bank were not well able and willing to carry it out. They offered to carry it out before the County Court Judge, and they have renewed the offer before this Court. There was a suggestion that the bank had no power to enter into the arrangement, but the suggestion fell through. There was also a suggestion that the creditors had not time to consider the offer, but such an offer did not want time. An offer of that kind—10*s.* 2*d.* in the pound, as contrasted with an offer of 10*s.* in four instalments, called for no time to consider—it spoke for itself. But we have the evidence before us of what took place at the meeting. Mr. *Cobbett*, who appeared for several creditors, stated openly in his speech that 6*d.* in the pound was not sufficient to induce them to accept the bank's offer, and thereby take so large a firm of merchants as the debtors off the *Manchester* market. That is not a legitimate motive. It may suit the *Manchester* creditors very well to keep established a large firm to buy *Manchester* goods. But the principle applicable to these cases has been laid down by the Court of Appeal, and I refer notably to the judgment of Lord Justice *James* in *Ex parte Page* (1). It is this—that the majority of creditors have power to bind the minority in reference to the benefit of creditors, but must not be actuated either by feelings of friendship or affection towards the debtor, or by a view to their own individual profit. It does not appear to me that the decision of the creditors in this particular case was arrived at properly, having regard to this rule, but that it was arrived at from a totally different motive. On all these grounds, I am of opinion that the decision of the County Court Judge was correct, and that we must restore his order.

JAMES, L.J.:—

I have arrived at the same conclusion. It appears to me clear that the County Court Judge was not only authorized by the Act to inquire, but that it was his bounden duty to inquire, into any relevant circumstances submitted to him by the dissentient creditors. In this case it is true there was only one creditor, a very

(1) 2 Ch. D. 323.

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large creditor, who dissented from the proposition which was made; that creditor did submit to the County Court Judge very important, very relevant, and very material facts indeed, upon which it appears to me it was in the power, and it was the duty, of the Judge to determine, and the Judge not being, as it appears to me, a mere ministerial officer to register the decision of the creditors, but being a Judge, and having to exercise judicial functions, it was his duty to inquire into and to determine upon the facts submitted to him. There were circumstances at least sufficient well to warrant the decision at which he arrived, and he was right in taking as a sufficient ground for his decision, without going into the rest of the case, the point upon which alone he has determined. He was well warranted in so determining, and I cannot agree with the Chief Judge that the sole duty of the County Court Judge was to ascertain whether there had been anything amounting to fraud in the proceedings at the meeting of creditors. The County Court Judge had at least a power as considerable as that which is exercised by the second meeting of creditors under sect. 126. I agree that the proceedings under the 28th section are essentially different in their character from those which the Legislature has thought fit to say shall be transacted under the 126th section of the Act. I think there is every reason to believe that, whatever mistakes may have been made, Mr. *Murray* was not acting in his own interest; he was probably giving up in this particular case a very profitable thing in assenting to what he conceived to be, and what no doubt was, the opinion of the great majority of the creditors, that the debtors ought to be set up again in business. He, no doubt, thought it was the right thing to do. I cannot help observing one thing, with the view of its being considered by the Legislature when a new Bankruptcy Bill comes under the consideration of Parliament. One has heard of a new way of paying old debts; one has heard of persons living upon the interest of their debts; one has heard in old comedies a frequent piece of satire, in representing a citizen as having made his fortune by three successive bankruptcies; but I never until the present case understood what I now realize, how it is possible for a man to be a penniless beggar and still to make a considerable fortune out of his bank-

ruptcy. It appears that in the month of November last year the state of these debtors' affairs was this—there were assets amounting to £99,724, and liabilities amounting to £153,740. The debtors said to the creditors, "Sell us the assets, £99,000, for 10*s.* in the pound." That would be about £75,000, and it might appear to them a reasonable enough offer. The debtors say, "The assets are £99,000. You know perfectly well from your experience in bankruptcy or liquidation that the £99,000 will never produce anything like that sum; if it produces two-thirds of it you may consider yourselves substantially lucky. Take the expense of a forced sale, the losses by such sale, the expense of all proceedings that may be taken here and in *Rio*, and say what do you think you can get out of the £99,000? You will probably say you will never get £75,000. We will give £75,000 for the £99,000 of assets." And the debtors thus get £25,000 as their net profit out of the liquidation. It is said this is not done at the expense of the creditors, but the debtors put into their pockets by way of gain the loss which their estate has escaped. This is a thing which I do not think the Legislature ever contemplated as the result of these compositions.

BRETT, L.J.:—

I should not have added a word to what my Lords have said, if I had not been compelled to be a judge of fact as well as of law, and if it had not been necessary in the course of the case frequently to use the word "fraud." I entirely agree with my Lords as to the construction of the statute. I wish particularly to notice this, that although under the 28th section, if there were fraud proved, it would be fatal to the approval of the Court, yet that the approval of the Court may be withheld although there is no symptom of fraud in the matter. It seems to me that the 28th section is wholly different from the 126th, because the duty of the Court under the 28th section is described in terms which are wholly different from those in which the duty of the Registrar under the 126th section is described. The inquiry which is to be made by the Registrar under the 126th section is minutely described by the terms of the section, but in the 28th section the duty of the Court in giving or withholding its ap-

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proval is described in terms so large as to impose upon it the duty of considering as a matter of judicial discretion whether the resolution which has been come to is fair and reasonable with regard to the object of the creditors. And it seems to me that the time at which the consideration of the Court ought to be applied is the time when its approval is asked for. The resolution may, when it is passed, be perfectly fair, on the facts known to everybody at the time, and such as every reasonable man would come to, yet if new facts are disclosed between that time and the time when the Court is asked to give its approval, the Court must judge upon those facts whether the resolution is erroneous, and whether the approval ought to be withheld. The question, therefore, was, at the time when the case came before the County Court Judge, and upon the facts then before him, whether he was justified as a matter of judicial discretion in withholding his approval. It is true that he had before him the fact that the resolutions had been agreed to by all the creditors but one, and I think that the approval of such a large majority of the creditors is a circumstance which he ought to have taken into account; but if, on all the facts then before him, he found that their decision was erroneous and not reasonably fair, he was bound to withhold his approval. The word "fraud" has been used, and I desire to say that I can see no evidence which would justify me in coming to the conclusion that the high character which Mr. *Murray* has held in *Manchester* up to this time for honesty and for honesty of purpose has been in the slightest degree blemished by anything which has occurred in this matter. It is impossible for me to suppose that anything Mr. *Murray* did was intentionally dishonest or unfair. But that is not the question; the question is whether Mr. *Murray's* judgment was erroneous or not; and more than that, supposing his judgment when he acted was not erroneous, yet, when the matter came before the County Court Judge, and when the mode in which the debtor, *Charles Durham*, had dealt with his property and his creditors was fully disclosed, and the errors in his statement of his assets, which have been pointed out by my Lord, were disclosed before the County Court Judge, the question is whether the County Court Judge was right, or whether Mr. *Murray* was right. I agree in every particular with every comment which

has been made by my Lord; I only thought it right to say that it is upon no suggestion of fraud in any of the gentlemen who are concerned in this matter that my opinion goes with that of the rest of the Court. It is entirely irrespective of fraud, in the existence of which I do not believe, except in the one particular of fraudulent preference, that I come to this conclusion.

Solicitors for Bank: *Gregory, Rowcliffes, & Rawle*, agents for *W. L. Welsh & Son, Manchester.*

Solicitors for Trustee: *Phelps, Sidgwick, & Biddle*, agents for *Sale, Seddon, & Co., Manchester.*

LONDON AND SUBURBAN LAND AND BUILDING COMPANY *v.* FIELD.

[1880 L. 38.]

Beershop—Covenant not to use Premises as a Public-house, Tavern, or Beershop—Sale of Beer to be consumed off the Premises.

A deed contained a covenant by the grantee of a piece of land that no building to be erected on the land should be used as a public-house, tavern, or beershop.

A lessee of the grantee obtained an off license authorizing him to sell at his shop, on the land, beer not to be drunk on the premises, and sold beer there accordingly:—

Held (affirming the decision of the Master of the Rolls), that this was a breach of the covenant.

Bishop of St. Albans v. *Battersby* (1) approved.

BY indenture, dated the 19th of July, 1870, the Plaintiff company conveyed a plot of land to *W. Watkins* in fee, subject to the provisions of an indenture of the 7th of December, 1867. This latter indenture was a deed by which each of the purchasers of the several lots of land sold by the company covenanted with the company, and also with the other purchasers, for the observance of several conditions, one of which was as follows:—

"On no piece of land except those numbered 290, 394, 424, and 608 on the said plan, shall any public-house, tavern, or beer-

(1) 3 Q. B. D. 359.

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shop be built, nor shall any messuage or other building to be erected on any piece of land be converted into or used as such."

Watkins executed this deed on the day of the date of the conveyance to him. His lot was not one of the four lots specially mentioned in the covenant. In 1873 he demised part of his lot to the Defendant, who built a shop upon it, and procured an off license authorizing him to sell beer at the same shop not to be drunk on the premises, and sold beer accordingly under the license.

The company were still owners of some of the lots mentioned in the indenture of the 7th of December, 1867, and brought an action to restrain the Defendant from using his shop as a public-house, tavern, or beershop. The Defendant demurred, and the demurrer was overruled by the Master of the Rolls, who gave no formal judgment, treating the case as concluded by *Bishop of St. Albans* v. *Battersby* (1). The Defendant appealed.

Chitty, Q.C., and *Caldecott*, for the Appellant:—

In the edition of *Burn's* Justice (2), which was current when the covenant in question was framed, a "beershop" is treated as being the same thing with a "beerhouse." He says, "a beer-house or shop is a house in which beer, ale, porter, cider, or perry is sold by retail to be drunk or consumed on the premises." According to Lord Justice *James*, in *London and North Western Railway Company* v. *Garnett* (3), a person who wished to know the legal meaning of "beerhouse" or "beershop" would resort to that book, and he would there find that beerhouse and beershop were the same thing. In that case it was held that sale of beer by retail to be consumed off the premises was not a breach of a covenant not to use a house as a beerhouse. In *Pease* v. *Coats* (4) a similar sale was held no breach of a covenant against using the premises as a public-house for the sale of beer, wine, malt liquors, or spirits. In *Jones* v. *Bone* (5) the sale of wine and spirits by a grocer was held not a breach of a covenant not to carry on the trade or calling of a seller by retail of wine, beer, spirits, or

(1) 3 Q. B. D. 359.
(2) Ed. 1845, p. 59.
(3) Law Rep. 9 Eq. 26.
(4) Ibid. 2 Eq. 688.
(5) Law Rep. 9 Eq. 674.

spirituous liquors. Licenses under 11 Geo. 4 & 1 Will. 4, c. 64, authorized the sale of beer generally. The Act 4 & 5 Will. 4, c. 85, introduced the granting of licenses for the sale of beer not to be consumed on the premises, and the Act 26 & 27 Vict. c. 33, s. 1, enabled wholesale dealers in beer to take out an additional license to retail beer not to be consumed on the premises. A place so licensed would not, according to the common understanding of words, be called a beershop. The word is well understood as synonymous with beerhouse. The decision of *Bishop of St. Albans* v. *Battersby* (1) is against us, but we ask the Court to overrule that decision.

Davey, Q.C., and *Tyssen, contrà*, were not called upon.

JAMES, L.J.:—

I think that we ought to give effect to the plain intention of the parties to the deed of the 7th of December, 1867. The object of introducing the covenant in question into the deed evidently was to prohibit any sale of beer which would diminish the value of the specified lots which it was intended to let or sell for the purpose of having beer sold on them. The word "beershop" in its natural sense means any shop at which beer is sold, and its meaning can only be confined if the word has acquired a technical meaning. The word "beerhouse" has acquired such a meaning, but there is nothing to shew that "beershop" has any technical sense.

BRETT, L.J.:—

There are many words used in business which have acquired in business some other than their ordinary meaning, and where such words are employed in a trade agreement they must be construed in that acquired or secondary sense. But where words are used which have not acquired any such secondary sense, they must be construed according to their ordinary meaning, unless there is something in the context of the instrument to shew that they are not used in that sense. Here two words are used which have a technical meaning, namely, "public-house" and "tavern," and if

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the third word had been "beerhouse," there again would have been a word which has acquired a technical meaning. But the word "beershop" has not acquired any such technical meaning, and I have no doubt that it means a shop where beer is sold. It includes a beerhouse, but it also includes a place where beer is sold, but which is not a beerhouse. As to the passage in *Burn's* Justice, people who draw these agreements rarely go to *Burn's* Justice, and we cannot presume that this covenant was framed with a view to what is there said as to the meaning of "beershop."

COTTON, L.J.:—

I am of the same opinion. It has not been established that the word "beershop" has acquired any technical meaning, and we must construe it according to its natural meaning. A shop means a place where goods are sold by retail, a beershop, therefore, means a place where beer is sold by retail, and it does not matter whether the beer is consumed on the premises or not. The word includes a beerhouse, but it also includes a shop where beer is sold to be consumed off the premises.

Solicitor for Plaintiffs: *T. W. Rogers.*

Solicitors for Defendants: *Shum, Crossman, Crossman, & Prichard.*

C. A. 1881 *Feb.* 15.

CHANDLER *v.* POCOCK.

[1879 C. 346.]

Settlement—Real Estate—General Power of Appointment—Power of Sale—Direction to lay out Money in Purchase of Land—Conversion—Reinvestment in Government Funds—Will—General Bequest of Personal Estate—Exercise of Power of Appointment—Wills Act, 1837 (1 *Vict. c.* 26), *ss.* 1, 27.

By *A.'s* marriage settlement, dated in 1832, her father settled certain real estate to the use of *A.* for life, and after her death, and in default of issue of the marriage, to the use of such persons as she should by will appoint, and in default of appointment to the use of the person under whom the Plaintiff claimed. The settlement contained a power for the trustee to sell the real estate, with a direction to lay out the proceeds, with *A.'s* consent,

in the purchase of other hereditaments to be settled to the like uses, with a power of interim investment, with the like consent, in Government securities.

By his will, dated in 1831, and confirmed, subject to the settlement, by a codicil executed shortly after the settlement, *A.*'s father devised the property, subject to the settlement, and all other his real estate, to the use of *A.* for life, and in default of her having any issue, to such uses as she should by will appoint.

Some years afterwards, *A.*'s father and husband both having died, and there having been no issue of the marriage, the trustees of the settlement, at *A.*'s request, sold all the settled real estate for a sum of £24,226 2*s.* 0*d.* consols, which they transferred to her.

A. died a widow in 1879, having by her will, made shortly after the transfer to her of the consols, after appointing executors and bequeathing pecuniary legacies amounting to upwards of £30,000, bequeathed "all the residue of my personal estate and effects whatsoever" to two persons absolutely. The personal estate to which *A.* was entitled at the date of her will and of her death, independently of the consols, did not amount to more than £6000:—

Held (affirming the decision of *Jessel*, M.R.), that the general devise of personal estate contained in *A.*'s will operated as an execution of the powers of appointment over the real estate given to her by her marriage settlement and by her father's will, and passed the consols.

THIS was an appeal from the decision of the Master of the Rolls (1). The facts, which are fully stated in the previous report, were shortly as follows:—

By the marriage settlement of *John* and *Ann Brown* certain real estate was settled after their deaths in the events which happened to such uses as *Ann Brown* should by will appoint, and in default of appointment to *Edward Lee*, the father of *Ann Brown*, in fee. The settlement contained a power to the trustees to sell the estate and reinvest the proceeds in land. *Edward Lee* died in 1843, having devised his real estate to *E. L. Baldwin*, under whom the Plaintiff claimed.

In 1855 the trustees sold the estate and invested the proceeds in consols.

In 1879 *Ann Brown* died, having by her will appointed the Defendants her executors, and bequeathed all her residuary personal estate to two legatees.

The Plaintiff claimed the consols as real estate unappointed by the will, but the Master of the Rolls held that the bequest in

(1) 15 Ch. D. 491.

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CHANDLER v. POCOCK.

Ann Brown's will operated as a valid appointment of the consols; and the Plaintiff appealed from this decision.

Chitty, Q.C., and *J. G. Wood*, for the Appellant:—

The power given to *Ann Brown* was not to appoint personal estate, but to appoint land, and that could only be effectually exercised by a general devise of land. Up to the *Wills Act*, a general devise of land carried moneys directed to be laid out in land: *Lingen* v. *Sowray* (1); *Guidot* v. *Guidot* (2); *Lechmere* v. *Earl of Carlisle* (3). Sect. 27 does not alter that rule, and only goes to this—that a general devise of real estate shall operate as an exercise of a general power to appoint real estate, and a general bequest of personal estate shall operate as an exercise of a general power to appoint personal estate. The words "my personal estate" are not a sufficient reference to the power, or to the proceeds of the real estate, and the Court must not assume an intention to execute the power, but must look to the circumstances at the time the devise takes effect: *Gillies* v. *Longlands* (4). The fund was not then at home, and the testatrix had no absolute power of disposal over it so as to make it her own, but only a power to appoint real estate by will. She could never have made it her personal estate, and therefore the fact that it had been transferred into her name may be disregarded. It was a wrongful possession by her. She was, in fact, a trustee of it for those entitled under the settlement, unless she effectually disposed of it by her will.

[They also referred to *Adams* v. *Austen* (5) and *Blake* v. *Blake* (6).]

Rigby (*Davey*, Q.C., with him), for the Defendants, the executors of *Ann Brown*:—

The testatrix, by obtaining a transfer, rightly or wrongly, of the fund into her name, shewed an intention to make it part of her personal estate. But, independently of that, I submit that under the *Wills Act*, more than pure personal estate is intended to pass under a general bequest of personalty. The first section of the

(1) 1 P. Wms. 172.
(2) 3 Atk. 254.
(3) 3 P. Wms. 211, 215.
(4) 4 De G. & Sm. 372.
(5) 3 Russ. 461.
(6) 15 Ch. D. 481.

Act defines personal estate to mean "leasehold estates and other chattels real, and also . . . all other property whatsoever which by law devolves upon the executor or administrator." Those words are wide enough to cover these consols.

[He was stopped.]

J. G. Wood, in reply.

JAMES, L.J.:—

In this case I am of opinion that the decision of the Master of the Rolls ought to be affirmed. Under the father's will and the settlement this fund was liable to be reinvested in land, and the testatrix had a power to appoint it by her will. Now what she did was this: almost immediately before the execution of her will, there being this fund outstanding in the hands of the trustees, and being liable to be reinvested in land, she applied to have the fund transferred into her own name. I cannot attribute any object to her in asking for that transfer, or any object to the trustees in making the transfer to her, but an intention to reduce it into possession—to make it her own personal estate, which it would be, subject to any equity which might be afterwards enforced against her executor, in case she died intestate. She intended to make it her personal estate so far as she could. Then, by her will, she gives the whole of her personal estate to certain persons, subject to certain legacies and other purposes mentioned in her will.

The question then is, was that gift by her liable to be defeated by a person who says "you have not exercised the power of appointment over it, because it was real estate"? It was real estate in the hands of the trustees, and was liable to be recalled and made real estate by any person who had an equity paramount to the equity of those who claimed under her will. But you must see whether what she has done was sufficient to destroy that equity, that is, the equity which could be enforced against her as a wrong-doer—treating her as having acted tortiously, whether she was a wrong-doer or not—and what she did was this. She gave all her personal estate, and she did it under a power in the *Wills Act* which says that a bequest of personal estate of a testa-

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trix shall be deemed to include any personal estate which she had power to appoint in any manner she pleased. Now, beyond all question or doubt, this was personal estate. It was existing as personal estate *de facto*. Whether you treat it as personal estate liable to be invested in land or not, the testatrix in this case had power to appoint it generally in any manner she thought fit. She does give it. It seems to me to be impossible to cut down the words of the will so as to prevent the will having any operation over that which she made her personal estate so far as she could. She intended to give it, and did give it, as part of her personal estate, so far as she had power to do so, whether it was real or personal estate. That being so, it seems to me that the decision of the Master of the Rolls is right.

COTTON, L.J.:—

First, I think it better to dispose of an argument which was pressed upon us by Mr. *Chitty* to some extent—that the testatrix was a trustee of this fund. I often object to a word being used inappropriately, and an argument being founded upon the inappropriate and improper use of that word. She was not a trustee. She took the money out of the name of the trustee and had it transferred into her own name, and thereby expressed an intention, as far as she could, to make it her own, and not to hold it as a trustee. It is true that there was a trust attaching to this money, and she was liable to be called upon to re-transfer to the trustee; and even if that was not done, unless she disposed of the property, those entitled under the settlement might claim against her estate for the amount of it. She was not trustee of it, and was not holding it as trustee, but she held it, as far as she could, as her own, subject to the rights in Equity which those interested under the settlement might have. Therefore it is impossible to say that this can pass under the words in her will which devise her trust estate. It simply is a question, therefore, whether it passes under the previous part of her will.

This, then, is not a question between two persons taking under her will, as to which devise or bequest most aptly describes the matter in contest, but whether there has or has not, having regard to the statute, been an exercise of the power under the one

and the only one clause of the will which can have that operation. When I look at the words of the Act of Parliament alone, I find it impossible to say that there has not been an exercise of the power as regards this fund, for it is personal estate, that is to say, it is property which, but for the will, would pass by law to and devolve upon executors and administrators. That being so, we have this, that although there was a trust which renders the fund liable to be laid out again in land, and it would therefore to some extent, in Equity, be impressed with the character of land, it is personal estate within the words of the 27th section, and the construction put upon it by the 1st section of the Act of Parliament. When one comes to treat it as a question of construction and intention on the testatrix's part, we find she had done all that she could to make this fund her personal estate and to take it out of the settlement; and, having regard to the facts of the case and to the expression of intention on her part independently of what there is in the will, I agree with the Master of the Rolls that we can see sufficient here to justify us, if it is a question of construction, in construing the words of her will as applying to the fund which she had dealt with in the manner she did. It is not necessary to go through the cases which have been cited. Two of them were cases where there was a contest between different appointees; but the case before Vice-Chancellor *Knight Bruce* of *Gillies* v. *Longlands* I must just refer to, because he, in my opinion, expressly decided that case on the ground that there had been nothing done by the lady to shew her wish or desire that there should not be a reinvestment in land. First, he says (1): "There is no doubt but that at the death of the husband the fund was impressed with the character of real estate. After the husband's death, the wife had no power of herself to change the character of the property, because her children had a right to a voice in the matter in respect of their interests in remainder." And then he goes on: "But independently of this consideration, I can find no such act of the widow as shews that she intended to change the character of the fund; and we know that it is not the actual state of the fund, but the state in which it ought to be, that governs the case. Therefore, this fund

(1) 4 De G. & Sm. 379.

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remained as it was immediately after the purchase of 1789, unless there has been an act indicating an intention that the state should be changed." He assumes there that she had no power effectually to put an end to the trust for investment in land, but he still considers whether there was anything on her part to shew an intention to treat it not as realty but as personalty. In this case, in my opinion, we have what shews her intention, although, I agree, it was not in her power absolutely to do it. Therefore that decision of Vice-Chancellor *Knight Bruce* cannot, in my opinion, having regard to what he says, be considered as in any way being an expression of opinion opposed to our judgment in this case, the facts and the circumstances here being different on a very material point.

LUSH, L.J.:—

I am of the same opinion.

JAMES, L.J.:—

Lord Justice *Cotton* has drawn attention to the fallacy of using the word "trustee." There is another fallacy. The fund has been spoken of as if it were real estate. But it is only treated as real estate because the heir-at-law, if the testatrix had died intestate, would be entitled to it as if it were real estate. It is quite a fallacy to say that it is real estate. It is not real estate, it is only *quasi* real estate. If the heir-at-law had taken it, it would be in his hands personal estate.

J. G. Wood:—I understand your Lordships to hold that the equity to have the fund reinvested is entirely displaced by the appointment, which operates so as to carry all the beneficial as well as the legal interest.

COTTON, L.J.:—Exactly so.

Solicitors: *Rogerson & Ford*, agents for *J. Ricketts, Bath; J. Crowdy & Son.*

Ex parte MATHEWES. *In re* SHARPE.

C. A.
1881
C. J. B.
Jan. 17.
C. A.
Feb. 17.

Liquidation Resolutions—Registration—Small Amount of Assets—Bona fides of Creditors—Opposition by Judgment Creditor—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 125—*Bankruptcy Rules*, 1870, *r.* 295.

The statement of affairs of a debtor who had filed a liquidation petition shewed that his debts were £1759 and his assets £85, the latter sum being subject to a deduction in respect of preferential debts. The creditors resolved upon a liquidation by arrangement, and gave the debtor an immediate discharge. They also voted £10 for the remuneration of the trustee. The registration of the resolutions was opposed by a creditor who had brought an action against the debtor for £182, but who had been restrained from proceeding with his action. He was in a position to sign judgment and issue execution so soon as the injunction should be dissolved:—

Held (by *Bacon*, C.J., and by the Court of Appeal), that, notwithstanding the small amount of the assets, the resolutions ought to be registered, the contest being really whether the assets, such as they were, should be distributed among the creditors generally, or be swept away by the judgment creditor, and this although the judgment creditor offered in the Court of Appeal to undertake to present a bankruptcy petition against the debtor.

Ex parte Early (1) followed.

Ex parte Staff (2) and *Ex parte Russell* (3) distinguished.

W. H. C. SHARPE, a commission agent at *Chiswick*, filed a liquidation petition in the *Brentford* County Court. By his statement of affairs produced to the first meeting of his creditors, held on the 11th of November, 1880, he estimated his debts at £1758 17*s.* He stated his assets to be, book debts about £229, estimated to produce £75, and furniture, fixtures, and fittings in his house, estimated to produce £10; making a total of £85. From this he deducted for "creditors to be paid in full" £41 8*s.*, leaving as the balance of net assets £43 12*s.* The £41 8*s.* was made up of £34 10*s.*, for three quarters of a year's rent of his house up to Michaelmas, 1880; £5 10*s.* for poor-rate and other rates; and £1 8*s.* due to a gas company. The creditors, by the proper statutory majority, resolved upon a liquidation by arrangement, and gave the debtor an immediate discharge. They also

(1) 13 Ch. D. 300. (2) Law Rep. 20 Eq. 775.
(3) Law Rep. 10 Ch. 255.

C. A. 1881 *Ex parte* MATHEWES. *In re* SHARPE.

resolved that the remuneration of the trustee should be £10. The registration of the resolutions was opposed by *John Mathewes*, a creditor who claimed a debt of £182 13*s.* 9*d.* in respect of bills which the debtor had accepted. *Mathewes* had issued a writ specially indorsed under Order XIV. of the Rules of Court, 1875, and the debtor had obtained leave to defend upon the terms of paying £169 2*s.* 3*d.* into Court within a week from the date of the order. The payment had not been made within the week. *Mathewes* had, after the filing of the petition, been restrained by an order of the County Court from further proceeding with his action. A Mr. *Lucas*, a creditor, who had acted as chairman of the meeting, made an affidavit in which he stated that the debtor was examined at the meeting, and that from his examination it appeared that the bills of which *Mathewes* was the holder had been accepted by the debtor for the accommodation of a Mr. *Carr*, that *Carr* had a good income, and that it was probable he would ultimately pay the bills. The debts of *Sharpe* also included his liability upon other bills which he had accepted for *Carr's* accommodation, and which it was probable *Carr* would pay, and if he did so *Sharpe's* debts would be reduced to about £1000. *Lucas* also said that from inquiries he had made he believed that the value of the debtor's assets had been very much underestimated in his statement of affairs. *Lucas*, moreover, said that the debtor's solicitors, who were also appointed solicitors to the trustee, informed the meeting that they would be content to take only their costs out of pocket of the proceedings.

The Registrar decided to register the resolutions, being of opinion that the case was governed by *Ex parte Early* (1). This decision was affirmed by the Judge on the same ground. *Mathewes* appealed to the Chief Judge. The appeal was heard on the 17th of January, 1881.

D. Brynmôr Jones, for the Appellant:—

There are no substantial assets available for distribution, and the proceedings are an abuse of the process of the Court. No possible benefit can accrue to the creditors from registering the resolutions—there not being one shilling to divide amongst them.

(1) 13 Ch. D. 300.

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Thus the principles of *Ex parte Staff* (1) and *Ex parte Aaronson* (2) apply.

Ex parte Hope (3) and *Ex parte Early* (4) are distinguishable. *Mathewes* is not an execution creditor, though he has recovered judgment.

E. Cooper Willis, for the debtor, was not called upon.

BACON, C.J.:—

In my opinion the case is governed by *Ex parte Early*.

The debtor, being sued by *Mathewes*, has to consider whether he will yield to the extent of his means or not. Instead of doing so, he calls his creditors together, and tells them plainly: "Whatever my property is, great or small, I surrender it all, not for the benefit of one creditor, but for the benefit of all." The facts are almost exactly the same as they were in *Ex parte Early*, and the question is really one between *Mathewes* and the other creditors.

What is the ground on which the appeal is presented to the Court? Not that the proceedings were set on foot from malice or any improper motive. Nothing of the kind has been suggested. The only suggestion is, that the assets are very small, and that they may amount to nothing. But that alone will not vitiate resolutions for liquidation. The real question is, as it was in *Ex parte Early*, whether one creditor shall take to the exclusion of all the rest.

In *Ex parte Hope* (5), I thought the resolutions were too unfavourable to the interests of the creditors, but the Court of Appeal came to a different conclusion.

I cannot distinguish this case from *Ex parte Early*, and the appeal must be dismissed with costs.

C. A.

From this decision *Mathewes* appealed. The appeal was heard on the 17th of February, 1881.

Yate Lee, for the Appellant:—

The assets are so small in proportion to the liabilities that no

(1) Law Rep. 20 Eq. 775.
(2) 7 Ch. D. 713.
(3) 9 Ch. D. 398.
(4) 13 Ch. D. 300.
(5) 9 Ch. D. 398, 402.

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dividend can possibly be paid to the creditors, and the resolutions were evidently passed from motives of friendship to the debtor, and with the view of giving him a discharge. Under such circumstances the resolutions ought not to be registered: *Ex parte Staff* (1); *Ex parte Russell* (2); *Ex parte Aaronson* (3). In *Ex parte Early* (4), the contest was whether one execution creditor should have all the assets. The Appellant has not got an execution. He desires that the debtor should be made a bankrupt, and pass a public examination, so that his statement of his assets may be tested, and the proofs of the friendly creditors examined into. The Appellant does not want to obtain any advantage over the other creditors, and he is willing to undertake to present a bankruptcy petition.

Winslow, Q.C., and *E. Cooper Willis*, for the debtor:—

If the assets are very small, why should they be diminished by such an investigation as is proposed? And two Judges have held that the resolutions were passed *bonâ fide*. It has never been suggested till now that the Appellant wants a bankruptcy. If the injunction were removed he could at once sign judgment, and then he could attach the debts due to the debtor, and sweep away everything. *Ex parte Early* exactly applies. From the explanations which were given at the meeting, the creditors had reason to believe that the liabilities would be considerably less, and the assets considerably more, than appeared by the debtor's statement. *Ex parte Russell* and *Ex parte Aaronson* are distinguishable. In the former, the creditors gave up to the debtor the whole of his half-pay as a military officer, and in the latter the debtor had given a bill of sale of the whole of his property, and there was nothing to shew that it was not valid.

Yate Lee, in reply:—

Ex parte Early does not apply. If the registration of the resolutions is refused, the Appellant will gain no advantage. The filing of the petition was an act of bankruptcy, and some other creditor will no doubt present a bankruptcy petition. The Appel-

(1) Law Rep. 20 Eq. 775.
(2) Ibid. 10 Ch. 255.
(3) 7 Ch. D. 713.
(4) 13 Ch. D. 300.

lant will undertake to do so himself. In *Ex parte Early* (1) an execution had been actually levied by the dissenting creditor, and it was certain that he would sweep away the whole of the assets. If this decision is supported, then in every case in which the assets are very small, liquidation resolutions must be registered if one creditor has a judgment for a sum large enough to cover the whole assets.

JAMES, L.J.:—

It appears to me impossible to find any sound distinction between the present case and *Ex parte Early*. In *Ex parte Staff* (2) and *Ex parte Russell* (3), the Court came to the conclusion that the resolutions had not been passed in the interest of the creditors, that in fact they had no interest in the matter. In *Ex parte Early* the creditors had an interest in getting the whole of the assets distributed among themselves, and in preventing them from being all taken by one creditor who had levied an execution. Their contest was not in favour of the debtor, but in favour of themselves. It appears to me that we cannot say that the present case is not exactly the same, and I cannot see any ground for a distinction between it and *Ex parte Early*.

COTTON, L.J.:—

I think that there is no substantial distinction between *Ex parte Early* and the present case, and therefore, though with reluctance, I have come to the conclusion that the resolutions must stand.

LUSH, L.J.:—

The question is whether the creditors are making use of the resolutions merely for the purpose of rescuing the debtor from difficulty, or for the purpose of getting the assets distributed among themselves? The Courts below thought that the facts were really the same as those in *Ex parte Early*, that there was a contest between the creditors generally and the one creditor who was endeavouring to sweep away the whole of the assets. I

(1) 13 Ch. D. 300. (2) Law Rep. 20 Eq. 775.
(3) Law Rep. 10 Ch. 255.

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should have arrived, independently of *Ex parte Early* (1), at the conclusion that the resolutions ought to be registered. But I think that the present case is exactly within that decision.

Appeal dismissed with costs.

Solicitors for Appellant: *Spyer & Son.*
Solicitors for Debtor: *Greenfield & Abbott.*

C. A. 1881 *Feb.* 23.

ROBINSON *v.* PICKERING.

[1880 R. 2101.]

Married Woman—Separate Estate—General Engagements—Action by Creditor—Injunction to restrain Dealing with Separate Estate—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.

24 Ch D 676

In an action by a creditor to enforce against the separate estate of a married woman a general engagement entered into with her on the credit of that estate, the Court will not, before the creditor has established his right by obtaining a judgment, restrain the married woman from dealing with her separate estate.

Decision of *Malins*, V.C., reversed.

THE Plaintiff was a tradesman; the Defendants were a husband and wife and the trustees of their marriage settlement.

By his statement of claim the Plaintiff alleged that the wife was entitled for her sole and separate use to certain furniture and cash which was vested in the trustees. The Plaintiff alleged that he had supplied her with divers goods on the credit of her separate estate; that she had made various payments to him out of that estate in respect of the goods so supplied, and that she was indebted to him in the sum of £436 8*s.* 4*d.* for goods so supplied and obtained by her upon the credit of and with the intent to charge her separate estate with payment thereof. He also alleged that the Defendants threatened to dispose of the separate estate without satisfying his demand.

The Plaintiff claimed a declaration that he had a charge on the separate estate for payment of the £436 8*s.* 4*d.*; that an

(1) 13 Ch. D. 300.

inquiry might be directed to ascertain of what the separate estate of the wife which she had power to anticipate consisted; that the £436 8*s.* 4*d.*, with the costs of the action, might be raised and paid out of what should be found to be the separate estate of the wife in answer to the inquiry; and that in the meantime the Defendants might be restrained from parting or dealing with the separate estate which the wife had power to anticipate.

Upon the motion of the Plaintiff, Vice-Chancellor *Malins* granted the injunction asked for until judgment in the action or further order (1).

The husband and wife appealed.

Terrell, for the Appellants:—

The Plaintiff has obtained no charge on the separate estate, and is not therefore entitled to the injunction: *Johnson* v. *Gallagher* (2); *Murray* v. *Barlee* (3); *Owens* v. *Dickenson* (4).

Dundas Gardiner, for the Plaintiff:—

Sub-sect. 8 of sect. 25 of the *Judicature Act*, 1873, gives the Court power to grant an injunction in all cases in which it shall appear to the Court to be just or convenient to do so.

[JESSEL, M.R.:—That means according to settled legal principles. The practice may be altered, but not the law.]

Sect. 25 commences with a recital that "it is expedient to amend and declare the law as to the matters next hereinafter mentioned."

[JAMES, L.J.:—You cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property.]

In that case the creditor can issue a debtor's summons and take proceedings in bankruptcy against the debtor, and in the bankruptcy dealings with the debtor's property may be set aside, but a married woman is not subject to the bankrupt law.

[JESSEL, M.R.:—Under the old law men who were non-traders stood in exactly the same position.]

(1) *Ante*, p. 371.
(2) 3 D. F. & J. 494.
(3) 4 Sim. 82; 3 My. & K. 209.
(4) Cr. & Ph. 48.

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The married woman has contracted the debt on the faith of this identical property.

[JESSEL, M.R.:—Only in this sense, that the creditor can make the property available to satisfy his debt. The general engagements of a married woman do not create any charge on her separate estate.]

The Courts of Equity have gradually established the liability of the separate property of a married woman to pay her debts; why should not the Court go further, and prevent her from committing a gross fraud by contracting a liability on the credit of her separate estate, and then making away with it without satisfying her creditors? *Pike* v. *Fitzgibbon* (1). The injunction will preserve the property for the benefit of all her creditors; it will be in the nature of an equitable bankruptcy.

JESSEL, M.R.:—

With great respect to the Vice-Chancellor, I think that this order was granted improvidently, without regard to the settled law on the subject. The general engagements of a married woman contracted on the credit of her separate property bind that property in this sense, that a creditor can obtain a judgment against the separate estate, and can then obtain payment out of it. She stands in much the same position as a man who was a non-trader stood under the old law when non-traders could not be made bankrupt. You cannot get at the separate estate by any mesne process before you have established your right by obtaining a judgment. If this were not so, every married woman who depended on her separate estate might be left to starve because someone alleged that she was indebted to him. According to well-established principles and settled law a creditor who has got no judgment against the separate estate of a married woman cannot interfere to prevent her from dealing with her property.

JAMES, L.J.:—

I am entirely of the same opinion. There was at one time a notion that the engagements of a married woman were in the

(1) 14 Ch. D. 837.

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nature of charges on her separate estate. It was afterwards settled that only the relation of debtor and creditor existed, with a right for the creditor to go against the particular fund. And Lord *Cottenham* said in *Owens* v. *Dickenson* (1), that, if the engagements created charges on the separate estate, they would take priority in the order of their dates. The creditor is only entitled to obtain a judgment, and then execution will go against the separate estate. I agree with the Master of the Rolls that a creditor is no more entitled to such an injunction as this against a married woman than he would be entitled to it against a man.

LUSH, L.J.:—

I am entirely of the same opinion. The law on the subject is quite settled.

Solicitors for Appellants: *Elmslie, Forsyth, & Sedgwick.*
Solicitor for Plaintiff: *T. A. G. Powell.*

LAIRD *v.* BRIGGS.

C. A. 1881 Feb. 23.

[1879 L. 148.]

Practice—Time for Appealing—Refusal of Application at Trial for Leave to amend Pleadings—Rules of Court, 1875, *Order* LVIII., *r.* 15.

When at the trial of an action an application for leave to amend the pleadings is refused, the refusal forms part of the judgment, and it is unnecessary to appeal separately from it; but on an appeal from the judgment the Court of Appeal has power, if it thinks fit, to give leave to amend.

It is contrary to the practice to insert in the judgment as drawn up any mention of the refusal of leave to amend.

AT the trial of this action before Mr. Justice *Fry*, on the 14th of December, 1880 (2), the counsel for the Defendant at the Bar asked for leave to amend the statement of defence. Mr. Justice *Fry* refused the application, and he gave judgment for the Plaintiff on the merits, granting an injunction to restrain the Defendant

(1) Cr. & Ph. 48, 53. (2) *Ante*, p. 440.

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from committing certain acts of trespass. The judgment, as drawn up at the request of the Defendant's solicitors, contained the following: "And the Defendant by his counsel asking leave to amend his statement of defence by, &c., the Court doth not think fit to make any order on the said application." The judgment then went on to grant the injunction. The Defendant served notice of appeal from the judgment, specifying in his notice the nature of the injunction, but in no way referring to the refusal of leave to amend. On the 7th of February, 1881, the Defendant served the Plaintiff with notice of an original motion in the Court of Appeal, asking that, notwithstanding that the time limited by rule 15 of Order LVIII. of the Rules of Court, 1875, had expired, the Defendant might be at liberty to give notice of appeal from the refusal of leave to amend the statement of defence.

T. Brett, for the Defendant.

Cookson, Q.C., and *W. W. S. Follett*, for the Plaintiff, were not heard.

JESSEL, M.R.:—

The refusal of leave to amend is simply part of the trial. As you have appealed from the whole judgment the whole case will be open on the appeal, and if the Court of Appeal shall be of opinion that you ought to have had leave to amend it will have power to give you leave then. There is no necessity for a separate appeal. The motion must be refused with costs. The refusal of the application ought not to have been noticed in the judgment; it is contrary to the practice to do so.

JAMES and LUSH, L.JJ., concurred.

Solicitors for Defendant: *Remnant, Penley, & Grubbe.*
Solicitors for Plaintiff: *Harrisons.*

Ex parte ROGERS. *In re* BOUSTEAD.

C. A. 1881 Feb. 24.

Bankruptcy—Injunction—Action against Bankrupt in Colonial Court—Sequestration to compel Appearance—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 13—*Bankruptcy Rules*, 1870, *r.* 260.

Before issuing a sequestration against real estate of a bankrupt situate in a colony, for the purpose of compelling his appearance in an action in the Colonial Court to realize a mortgage given by him of other real estate in the colony, the leave of the Court of Bankruptcy ought to be obtained.

But where such a sequestration had been issued without leave, and an appearance had been entered in the colonial action :—

Held, that it was sufficient that the Plaintiffs in the action should undertake not to use the sequestration for any other purpose.

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

On the 29th of July, 1879, *John Boustead* and *A. W. Ridly*, who traded in *London* as *Price, Boustead, & Co.*, filed a liquidation petition, under which *Arthur Cooper* was appointed trustee of their joint property, and also of the separate property of *Boustead*. *Boustead* was possessed of some real estates in *Ceylon*. On the 15th of August, 1877, he had executed a deed or bond of mortgage of one of these estates, known as the *Delta and East Delta Coffee* estate or plantation, to a firm of *Henry Rogers, Sons, & Co.* On the 25th of May, 1880, the mortgagees commenced an action in the District Court of *Colombo* in *Ceylon* against *Boustead*, to enforce their mortgage. On the 8th of June, 1880, the District Court directed a writ of sequestration to issue, under which the Fiscal of the district of *Colombo* on the 24th of January, 1880, made a return that he had seized and sequestrated an estate of *Boustead* situate at *Colpetty* in *Ceylon*. This estate was not included in the mortgage. The sequestration was issued according to the practice of the *Ceylon* Court for the purpose of compelling the appearance of *Boustead* in the action.

The trustee in the liquidation applied on the 2nd of September, 1880, to the Court of Bankruptcy for an order restraining the mortgagees from taking any further proceedings in the action in

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Ceylon against *Boustead* or upon the sequestration, and for a further order that the mortgagees should at once take such steps as might be necessary to withdraw the sequestration. The Registrar granted an injunction restraining the mortgagees from taking any further proceedings in the action, so far only as it affected (if at all) the person of *Boustead* or the *Colpetty* property, or other property of *Boustead* not included in the mortgage. And it was ordered that the mortgagees should take such steps as might be necessary to withdraw the sequestration.

The mortgagees appealed.

Since the Registrar's order an appearance had been entered in the action.

Robinson, Q.C., and *J. Bryce*, for the Appellants :—

The injunction goes too far. We offered before the Registrar to undertake to use the sequestration only for the purpose of compelling appearance, and we are willing now to undertake not to proceed any further under it.

J. E. Linklater, for the trustee :—

The action was not commenced till after all the property of the debtors had vested in the trustee. The sequestration is therefore really issued against the property of *A.* to compel the appearance of *B.*

[JESSEL, M.R. :—I believe that under the law of *Ceylon* the title to immoveable property does not pass until registration.]

The *Bankruptcy Act* is an imperial statute which is binding in the colonies : *Ellis* v. *M'Henry* (1).

[JESSEL, M.R. :—It only passes immoveable property in the colonies according to the law of the colonies.]

The law of *Ceylon* must be proved by evidence. We are asking to restrain the proceedings in an action of debt against liquidating debtors ; unless there is evidence to the contrary, the Court must hold that the English law applies : *Robson* on Bankruptcy (2) ; *Cockerell* v. *Dickens* (3).

(1) Law Rep. 6 C. P. 228. (2) 3rd Ed. p. 420.
(3) 1 M. D. & D. 45, 79.

[JAMES, L.J.:—The bankruptcy law does not interfere with securities; the object of the action is to enforce the mortgagee's security according to the law of *Ceylon*.]

It is really an action for debt. In *Ex parte Scinde Railway Company* (1) it was held that judgment creditors in *England* of a company in liquidation in *England*, who had proved in the winding-up, could not attach property of the company in *India*. The Appellants have proved in the liquidation in respect of another debt. The sequestration gives them a security after the commencement of the liquidation.

[JESSEL, M.R.:—It is only a sequestration to compel appearance. It is in the nature of a pledge and does not pass any property.]

The definition of "property" in sect. 4 of the *Bankruptcy Act*, 1869, is large enough to include this real estate. If the Appellants once get a judgment in the action it will be but a short step to get an *elegit* against real estate of the debtors in *Ceylon*.

JESSEL, M.R.:—

It appears to me that the sequestration was really issued only to compel the appearance of the Defendant. The action was brought to realize the Plaintiffs' security. It is said that the sequestration will enable them to take away the property and keep it as a pledge. But they are willing to undertake to use it only in order to compel appearance. It appears to me that leave ought to have been obtained from the Court of Bankruptcy before the mortgagees took any such step. I think there has been a mistake on both sides. However, it now seems that an appearance has been entered in the action, and therefore the sequestration is no longer wanted. The Appellants are willing to undertake not to use it for any other purpose, and not to use the proceeds of it for paying any other debt. On this undertaking being given the order of the Registrar will be discharged, and each side will pay their own costs.

JAMES and LUSH, L.JJ., concurred.

(1) Law Rep. 9 Ch. 557.

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Robinson, Q.C.:—We have succeeded in our appeal.

JESSEL, M.R.:—If you take away a bankrupt's property, even though you do so only for the purpose of compelling his appearance in an action, you do interfere with the administration in bankruptcy.

Solicitors for Mortgagees: *Druce, Sons, & Jackson.*
Solicitors for Trustee: *Hollams, Son, & Coward.*

C. A. 1881 Feb. 24.

Ex parte SAFFERY. *In re* BRENNER.

Bill of Sale—Registration—"Apparent Possession" of Grantor—Actual Possession of Sheriff under Execution—Bills of Sale Act, 1878 (41 & 42 *Vict.* c. 31), *s.* 8.

If the goods comprised in an unregistered bill of sale are, at the time of the filing of a bankruptcy petition against the grantor, in the actual visible possession of the sheriff under an execution, issued either by the grantee or by a third person, they are not, even though the grantee has himself taken no possession, in the "apparent possession" of the grantor, and the *Bills of Sale Act* does not apply.

Ex parte Mutton (1) not followed.

14 B D 318
19 Ch D 422
425,
23 Ch 163-5

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

On the 19th of May, 1879, a bankruptcy petition was presented against *Philip Brenner*, a builder, founded upon an act of bankruptcy committed by him on the 6th of May, and on the 21st of May an adjudication of bankruptcy was made against him upon a petition presented on the 19th of May. The trustee in the bankruptcy applied to the Court for an order declaring that an agreement, dated the 5th of May, 1879, and made between the bankrupt of the one part and *S. L. Frankenberg* of the other part, was fraudulent and void as against the trustee.

By an agreement dated the 6th of December, 1878, and made between *Frankenberg* of the one part and the bankrupt of the other part, *Brenner* agreed with *Frankenberg* to complete and

(1) Law Rep. 14 Eq. 178.

finish fit for use and habitation, upon the terms therein mentioned, certain houses and shops in *Cecilia Terrace, Lower Norwood.*

By another agreement, dated the 28th of March, 1879, and made between *Frankenberg* of the one part and the bankrupt of the other part, the bankrupt agreed to purchase from *Frankenberg* some premises at *Bermondsey.*

The agreement of the 5th of May, 1879, contained a recital that the bankrupt had partially erected the houses and shops in *Cecilia Terrace,* but was unable to complete the same, and that he was also unable to complete the purchase of the premises at *Bermondsey,* but for the purpose of building thereon he had placed a quantity of building materials thereon, and another recital that *Frankenberg* had agreed to purchase the said building materials at the sum of £500, in consideration that the two agreements of December, 1878, and March, 1879, should be cancelled by the bankrupt, and that possession should be given to *Frankenberg* of the premises mentioned in the two agreements, together with the materials which had been put on the premises in *Cecilia Terrace,* and also in a workshop and premises in *Birkbeck Road,* near thereto, which had been used for the building operations. And it was witnessed that, in consideration of £500 paid to the bankrupt on the signature thereof, the bankrupt did thereby cancel and put an end to the two agreements, and did thereby withdraw from any possession of the premises respectively, and did assign unto *Frankenberg* all the goods, chattels, and effects of what kind or description soever then being in any part of the premises referred to in the two agreements respectively, and also upon or about the workshop and premises in *Birkbeck Road,* and also all builders' or other plant in or upon the said several premises, or any part thereof respectively. The agreement was not registered as a bill of sale.

The trustee alleged that this agreement was fraudulent in fact, and also that it ought to have been registered as a bill of sale, and that the goods comprised in it were at or after the filing of the bankruptcy petition in the possession or apparent possession of the bankrupt. There were some other objections which it is unnecessary to state for the purposes of this report.

It appeared by the evidence that on the 6th of May the sheriff

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of *Surrey* seized the goods which were in the workshop in *Birkbeck Road*, under an execution issued by *Frankenberg*, and that the sheriff remained in possession of the goods until the 21st of May, when he withdrew at the request of *Frankenberg*, who then took possession of the goods himself, and afterwards removed them. During the time of the sheriff's possession the names of *Brenner* and another person were painted on the door of the workshop. The Registrar refused the application. The trustee appealed.

Horton Smith, Q.C., and *Oswald*, for the Appellant :—

The evidence shews actual fraud. But, even if there was no fraud, the goods were in the apparent possession of the bankrupt at the time of the filing of the bankruptcy petition. The possession of the sheriff was not sufficient to exclude the bankrupt's apparent possession: *Ex parte Mutton* (1); *Ex parte Edey* (2).

Winslow, Q.C., and *J. E. Linklater*, for *Frankenberg*, were not heard.

JESSEL, M.R. :—

I think that the Registrar has come to a right conclusion on all the points. [His Lordship then referred to the evidence and expressed his opinion that the Appellant had failed to prove the alleged fraud. After dealing with another point he continued :—] As to the question which arises under the *Bills of Sale Act*, the time to be looked at is that of the filing of the bankruptcy petition. It was filed on the 19th of May, and the sheriff was then in possession of the goods under an execution issued by *Frankenberg*. It is said that the bankrupt was in actual or apparent possession. Actual possession he had none, for the sheriff was in actual possession. And apparent possession cannot be put higher than actual possession. The only person who was allowed by the sheriff to remove the goods was the execution creditor. The bankrupt was not there, and he had nothing to do with the goods. It is said that his name with that of another person was on the door of the workshop. But that alone is not enough to make the apparent possession his. The question is whether any person who went

(1) Law Rep. 14 Eq. 178. (2) Law Rep. 19 Eq. 264.

there would conclude that the bankrupt was in the sole possession of the goods, and it appears to me that he would not. The appeal, therefore, fails altogether.

JAMES, L.J.:—

I am of the same opinion.

LUSH, L.J.:—

I am of the same opinion. I think there is no evidence whatever of any fraud in the transaction. With regard to the question which arises upon the *Bills of Sale Act*, the case has been argued as if "apparent possession" would defeat the bill of sale although the actual possession had been taken out of the grantor. But if the grantee of a bill of sale chooses not to register it, but takes actual possession of the goods within the seven days allowed for registration, his title is as good as if the deed had been registered. There used formerly to be a practice of giving symbolical possession under a bill of sale by handing over a chair or something of that sort in the name of the whole of the goods, or putting a person on the premises as one of the bankrupt's family, leaving the grantor as much the apparent owner of the goods as he was before the execution of the bill of sale. It was against such transactions that the words "apparent possession" in the Act were aimed. But if the grantee or any third person takes actual possession of the goods, the requirements of the *Bills of Sale Act* are satisfied. In the present case the sheriff was in actual possession of the goods long before the petition was filed, and there is no suggestion that he went in under any disguise. If he did his duty he was in actual possession long before the petition was filed; and therefore the Act was satisfied, and the bill of sale is perfectly good as against the trustee, though it has not been registered. When I say "actual possession," I mean actual visible possession, such a possession that every one exercising ordinary vigilance can see it. If the sheriff's officer took possession in the disguise of a livery servant of the grantor, of course that would not do.

Solicitors for Appellant: *Keene, Marsland, & Bryden.*
Solicitor for Respondent: *W. Rawlins.*

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1881
Feb. 26.

In re HOLLAND. *In re* HOWARTH'S TRUSTS.

Lunatic Trustee—Vesting Order—Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *s.* 3.

A trustee of property held in trust for *A. B.* absolutely having become lunatic, *A. B.* presented a petition asking that the property might be vested in himself:—

Held, that such an order ought not to be made, but that a new trustee ought to be appointed and the property vested in him.

By indenture, dated the 21st of December, 1876, made between *John Howarth* of the first part, *B. Collinge* and *Sarah* his wife of the second part, *Thomas Howarth* of the third part, and *John Holland* of the fourth part, *John Howarth*, with the privity of *Collinge* and wife, and of *Thomas Howarth*, assigned to *John Holland*, *B. Collinge*, and *Thomas Howarth* respectively, and their respective executors, administrators, and assigns, certain leaseholds, to hold the same to *John Holland*, *B. Collinge*, and *Thomas Howarth*, their executors, administrators, and assigns, for the residue of the term in manner following, namely, as to one undivided third share to *J. Holland*, his executors, administrators, and assigns, in trust for *John Howarth*, his executors, administrators, and assigns, subject to the payment of one-third of the rent; as to another third share, to *Collinge*, his executors, administrators, and assigns, subject to one-third of the rent; and as to the remaining one-third, to *Thomas Howarth*, his executors, administrators, and assigns, subject to one-third of the rent.

Holland having been found lunatic, *John Howarth* presented a petition asking that the undivided third which had been assigned to *Holland* in trust for the Petitioner might vest in the Petitioner for all the estate vested in *Holland*.

Hadley, for the Petitioner, referred to the *Trustee Act*, 1850, s. 3, as authorizing the order prayed for.

[Cotton, L.J.:—It is not the practice of the Court to make such an order. The proper course is to appoint a new trustee.]

That would cause useless expense. The Petitioner is absolute beneficial owner.

The committee was served, but did not appear.

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COTTON, L.J.:—

The Petitioner must have had some object in creating the trust, and he now seeks to put an end to it. The Court, in acting under the Trustee Acts, never administers trusts, but only appoints new trustees when requisite; and even if there is jurisdiction to make the order asked for, which I doubt, I do not feel disposed to exercise it. The petition must stand over, with liberty to amend it by making it ask for the appointment of a new trustee, and a vesting order; and when the order has been made appointing a new trustee, and vesting the estate in him, the Petitioner can take such steps as he may be advised to obtain a reconveyance, and put an end to the trust.

JAMES and LUSH, L.JJ., concurred.

Solicitors: *Norris, Allens, & Carter.*

In re SMYTH (A LUNATIC).

C. A.
1881
Feb. 26.

Lunatic—Practice—Order to inspect Documents by a Person claiming under a Deceased Lunatic.

A lunatic having died intestate, and an action having been commenced for recovery of his real estate:—

Held, that the Defendant, who produced *primâ facie* evidence of his being heir-at-law of the lunatic, was entitled to an order to inspect the documents relating to the estate which were in the custody of the Registrars in Lunacy, although it was sworn on the other side, and not contradicted, that the lands had descended to the lunatic from his mother, and that the Defendant was no relation to the mother.

THIS was a petition by *Samuel Smyth* for liberty to inspect the documents relating to the lunatic's estate, which were in the custody of the Registrars in Lunacy. The lunatic had died a bachelor, leaving neither father, mother, brother or sister, uncle or aunt, nephew or niece. He had made a will, but all the persons named in it had died in his lifetime. An action had been com-

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menced in the Exchequer Division by *T. S. Lawford* against *Samuel Smyth* to recover the real estate of the lunatic, the issues in which turned on the pedigree of the lunatic, and whether the descent ought to be traced *ex parte paternâ* or *ex parte maternâ*. *Lawford* claimed as heir-at-law *ex parte maternâ* of the lunatic; and on the 17th of July, 1880, having produced *primâ facie* evidence that he was such heir-at-law, he obtained an order for leave to inspect the documents in question (1).

Samuel Smyth now made a similar application, producing *primâ facie* evidence of his being heir-at-law. In opposition to this an affidavit was filed on behalf of *Lawford*, stating that the lunatic acquired the property by descent from his mother; that *Smyth* was not any relation to the mother of the lunatic, and could not suggest even a *primâ facie* ground for his having any interest in the property.

R. F. Norton, for the Petitioner.

Yate Lee, for the Respondent *Lawford*:—

I submit that as the affidavit that the property descended to the lunatic from his mother, and that *Smyth* is no relation of the mother, is uncontradicted, no *primâ facie* case of interest in the documents is made out by the Petitioner, and inspection ought not to be allowed.

COTTON, L.J.:—

The lunatic having died intestate as to his real estate, the Petitioner, who has produced *primâ facie* evidence of his being the lunatic's heir-at-law, has, in my opinion, shewn a sufficient title to inspect the documents. The Court requires *primâ facie* evidence of an interest in the documents, because they ought not to be open to the inspection of strangers, who have no shadow of interest in them; but any *primâ facie* case which makes it reasonably probable that the documents may contain something to support the applicant's case is sufficient. Whether the property belongs to the heir *ex parte paternâ* or to the heir *ex parte maternâ* is a question to be tried in the action, and ought not to be prejudged

(1) 15 Ch. D. 286.

here. Supposing that the lunatic acquired the lands from his mother, the documents may contain something to shew that the descent is, nevertheless, to be traced from him. The Defendant, therefore, ought to have an order similar to that previously made in favour of the Plaintiff.

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JAMES and LUSH, L.JJ., concurred.

Solicitors: *Chester & Co.; Peacock & Goddard.*

Ex parte BURDEN. *In re* NEIL.

C. A. 1881 *March* 10.

Debtor's Summons—Stay of Proceedings—Conditional Agreement for Reduction of Debt—Default in fulfilling Condition—Revivor of Original Debt—Penalty—Waiver—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 7.

A creditor having issued a debtor's summons in respect of a judgment debt of £344, an agreement was made that the debtor should give the creditor a cheque for £50, and three bills of exchange for £50 each, accepted by a third person, and payable respectively in three, six, and nine months, and that, upon payment of the cheque and the bills in due course, and a receipt for a debt due by the creditor to the debtor's brother being handed to the creditor, he should give a receipt in full satisfaction of the judgment debt. In default of payment of any or either of the cheque or bills, the creditor was to be at liberty to proceed for the full amount due. The cheque and the first two bills were paid in due course, but the third bill was not paid at maturity, the acceptor having forgotten to provide his bankers with funds to meet it. The creditor issued a writ against the acceptor, and he paid the dishonoured bill within a week after it became due. The creditor then issued a debtor's summons against the debtor for the unpaid balance of the original debt:—

Held, that the provision in the agreement for the revivor of the original debt upon default being made in the performance of any of the conditions was not a penalty, but that on the dishonour of the third bill the creditor was remitted to his original right, and that he had not waived that right by suing the acceptor.

The debtor having applied to the Court of Bankruptcy to dismiss the summons:—

Held (reversing the decision of the Registrar), that the proceedings on the summons ought not to have been stayed pending the trial of an action to determine the validity of the debt, but that the Registrar ought to have decided the question himself, and to have dismissed the application.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

C. A. 1881 *Ex parte* BURDEN. *In re* NEIL.

In February, 1880, *John Neil* was indebted to *T. G. Burden* in the sum of £200 damages, and a further sum for costs, which he had been, in June, 1878, by a judgment of the Divorce Division, ordered to pay to *Burden*, he having been the co-respondent in an action for divorce brought by *Burden* against his wife. At the same time *Burden* owed £59 to *Robert Neil*, the brother of *John Neil*. *Burden*, in February, 1880, issued a debtor's summons against *Neil* in respect of the damages and costs, and ultimately a compromise was entered into between Messrs. *Stopher & Rundle*, the solicitors of *Neil*, and Messrs. *Brownlow & Howe*, the solicitors of *Burden*, the terms of which were contained in the following document:—

"9 February, 1880.

"*Burden* v. *Burden* and *Neil*.

"*In re Neil*.

"Received of Messrs. *Stopher & Rundle* cheque for £50, and three bills of £50 each, payable at three, six, and nine months respectively. Upon payment of cheque and bills in due course, and receipt for amount owing by Mr. *Burden* to Mr. *Robert Neil* being handed to the former, Mr. *Burden* to give receipt in full satisfaction of damages and costs. In default of payment of any or either, Mr. *Burden* to be at liberty to proceed for full amount due.

(Signed) "*Brownlow & Howe*,

"Solicitors for Mr. *Burden*."

The three bills for £50 were drawn by *John Neil* upon and accepted by one *J. B. Lambe*. The cheque for £50 was duly paid, and the two bills payable at three and six months were paid at maturity. The third bill became due on the 12th of November, but was dishonoured. The receipt for the £59 due to *Robert Neil* was never handed to *Burden*. There was evidence that the failure to pay the third bill arose from a mere oversight on the part of *Lambe*, and that he had placed funds in the hands of his bankers in time to meet it on the 13th of November. On the 17th of November *Burden* commenced an action against *Lambe* on the dishonoured bill, and on the 19th of November *Lambe* paid the amount. On the 2nd of December, 1880, *Burden* issued a

debtor's summons against *John Neil*, claiming payment of £144 11s., the balance of the damages and costs and interest thereon, after giving credit for the £200 which had been paid by means of the cheque for £50 and the three bills. *Neil* denied that he was indebted, and applied to the Court to dismiss the summons. The Registrar, on the 22nd of December, made an order staying all proceedings under the summons, without security, until after the Court in which any proceedings taken or to be taken by *Burden* against *John Neil* for the recovery of the amount mentioned in the summons should have come to a decision thereon.

Burden appealed.

A. Cock, for the Appellant:—

The agreement for the reduction of the debt not having been strictly complied with, the Appellant was remitted to his original right: *Ex parte Gilbey* (1); *Protector Endowment Loan and Annuity Company* v. *Grice* (2). The right to proceed for the original debt is expressly reserved by the agreement in the event of default being made in payment of any of the instalments, and the agreement must be taken to mean what it says. The fact that the acceptor was ready to pay the third bill the day after it fell due is no reason for relieving the debtor from the consequences of its not being paid on the proper day. It was duly presented. The Registrar ought to have decided the question himself, and not to have put the parties to the expense of other proceedings.

Winslow, Q.C., and *Lewis Levy*, for the debtor:—

It was by a mere oversight that *Lambe* did not pay the third bill when it was due; he had forgotten it. It would have been paid the next day if it had been presented again. The Court will not allow a man to be made a bankrupt because of such an accidental omission: *In re Hatton* (3). *Ex parte Gilbey* is distinguishable. The suing the surety upon the third bill was a waiver of the original right: *In re Butler* (4). The surety was only a surety for the composition, and the Appellant by suing him asserted that the composition agreement was still existing.

(1) 8 Ch. D. 248.
(2) 5 Q. B. D. 121, 592.
(3) Law Rep. 7 Ch. 723, 726.
(4) 1 Ir. L. Rep. (Ch. D.) 225.

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[JAMES, L.J.:—How has the creditor elected? Had he not both rights?]

He could not sue *Lambe* for any part of the original debt. The consideration for the suretyship is the discharge of the debtor from the original debt.

[COTTON, L.J.:—There is no evidence of any agreement that the bill should not be enforced against *Lambe*, unless the original debt was given up.]

It is implied on the face of the document; the cheque and the three bills are to be taken in discharge of the debt. The only question decided by the Registrar was that the debt should be established in the ordinary way. The debtor is able to pay, and bankruptcy proceedings ought not to be pressed against him.

JAMES, L.J.:—

It appears to me that no hardship will be inflicted on the debtor; he has only got to pay the whole amount of his original debt. It is said that he is solvent. There was a time when the creditor was willing to accept less than the full amount of his debt upon certain conditions, but these conditions have not been fulfilled. I agree with what Lord Justice *Cotton* has suggested during the argument, that the doctrine of penalties never has been applied and ought not to be applied to a case of this kind. The condition of the agreement for a reduction of the debt has not been fulfilled, and if so, the creditor is remitted to his original remedy, and the debtor must pay that which he would have had to pay if the agreement had never been made. The application to dismiss the debtor's summons ought to have been dismissed.

COTTON, L.J.:—

I am of opinion that that is the order which ought to have been made. There are two questions—1. what is the true construction of the agreement; 2. whether there is any ground for relieving the debtor from his bargain. If there is no equitable ground for relieving him, he must pay the debt or take the consequences. In my opinion, the true meaning of the agreement is this, that if the cheque and the three bills were all duly paid at the appointed

times and the receipt was given for the debt due from *Burden* to *Neil's* brother, a receipt in full should be given by *Burden*, but that if either the cheque or any one of the bills should not be duly paid or the receipt for the brother's debt should not be given, the creditor was to be entitled to his original debt. It is expressly so provided. The creditor had nothing to do with the neglect or omission of the acceptor to meet the third bill on the proper day. He was bound to pay it when it became due, and the debtor must take the consequences of his not doing so. It is said that we ought to relieve him from those consequences. I think the sole question is, whether, under the agreement, the creditor has now a right to enforce his original debt. In my opinion he has, and if the debtor does not pay it the ordinary consequences must follow. It is said that the provision for the revivor of the original debt is in the nature of a penalty. I know of no case in which the equitable doctrine about penalties has been applied to a case in which a creditor agrees to reduce the amount of his claim on certain conditions, but that on the failure of the debtor to fulfil any one of those conditions the original rights of the creditor shall revive, and in my opinion the doctrine ought not to be applied to such a case. I think that the instance which was put by Lord Justice *James* during the argument, the case of the ordinary clause in a mortgage for the reduction of the interest from 5 to 4 per cent. in the event of punctual payment by the mortgagor, shews that a Court of Equity would not treat such a provision as this as a penalty, and would not interfere in such a case.

LUSH, L.J.:—

I am of opinion that the unpaid balance of the original debt constituted a good debt at law. The creditor agreed that, if the cheque and the bills were duly paid, and the receipt for the debt due by him to the debtor's brother was handed to him, he would give a receipt in full for his own debt, but that, if there should be a failure in the performance of any of the conditions, the creditor should be at liberty to enforce the original debt. There is nothing to prevent such an agreement from being legally carried out, and it is a thing which is constantly done. One of the bills was not paid at maturity, and another default was committed in not giving the

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receipt for the brother's debt. If an action had been brought for the balance of the original debt, no plea could have been framed as a defence to it; it could only have been said that there was an accord, it could not have been said that there was an accord and satisfaction. If all the bills had been duly paid, and the other condition had been fulfilled, no action could have been brought for the balance of the debt, but as it is, there would be no legal defence to an action. Is there any equitable ground for relieving the debtor? It has been argued that the provision for the revivor of the debt is a penalty. I understand a penalty to be something which a debtor is to pay, over and above his original liability, as a punishment. But that is not so in the present case. Then it is contended that the Appellant has waived his original right by suing the acceptor on the third bill. But that supposes that the creditor was put to an election. In my opinion, there was no case of election, but, on default in payment of the bill, the creditor was entitled to pursue all his remedies, those against the surety as well as those against the original debtor.

Solicitors for Appellant: *Brownlow & Howe.*
Solicitors for Respondent: *Stopher & Rundle.*

In re ALMA SPINNING COMPANY.

M. R.
1880
Nov. 12.

BOTTOMLEY'S CASE.

Limited Company—Articles of Association—Directors—Business to be conducted by not less than a certain number—Call—Forfeiture—Ultrà Vires.

Where the articles of association of a company provide that "the business of the company shall be conducted by not less than" a specified number of directors, the words are imperative, not merely directory: consequently a call made or a forfeiture of shares declared by less than the specified number of directors is invalid.

The articles of association of a limited company provided (Art. 35) that "the business of the company should be conducted by not less than five nor more than seven directors": also that the office of director should be vacated on bankruptcy or insolvency; and that "the directors might determine the quorum necessary for the transaction of business."

The articles named six persons only as directors, of whom *B.* was one. These directors fixed three of their number as a quorum.

In October, 1877, the number of directors being then reduced by death to five, *B.* became insolvent and therefore disqualified as a director.

In November the company passed, at an ordinary meeting, a resolution altering Article 35 by substituting "three" directors for "five." This resolution was admitted to be invalid as not having been passed in accordance with the articles.

In December the four remaining directors made a call. *B.* having made default in payment of this call, as well as a former call made prior to his insolvency, the same directors passed a resolution declaring his shares forfeited.

The company afterwards passed a resolution for a voluntary winding-up, in the course of which it turned out that there were surplus assets available for division among the shareholders:—

Held, that the second call and the forfeiture, having been made and declared by four directors only, were invalid; and, therefore, that *B.* was entitled, on payment of his calls to the liquidator, to be treated as a shareholder, and to participate in the surplus assets accordingly.

Thames-Haven Dock and Railway Company v. *Rose* (1) and *Kirk* v. *Bell* (2) considered.

ADJOURNED SUMMONS.

The *Alma Spinning Company, Limited*, was registered in 1876 under the Companies Acts, 1862 and 1867, with a capital of £15,000 in 3000 shares of £5 each.

(1) 4 Man. & G. 552. (2) 16 Q. B. 290.

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The company's articles of association contained the following provisions:—

The directors were empowered (Art. 4) to make calls upon the shareholders; and (Art. 6), in default of payment of calls by any shareholder after due notice, to declare his shares forfeited.

Art. 35. "The business of the company shall be conducted by not less than five, nor more than seven, directors;" the holder of twenty or more shares being eligible as a director:

Art. 43. "The office of director shall be vacated if he ceases to be the holder of twenty shares in the company, if he becomes bankrupt or insolvent . . .": and

Art. 45. "The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business . . ."

Art. 64 provided that no alteration in the articles should be made except at a special general meeting summoned for the purpose by a quarterly meeting, and after due notice of the proposed alterations.

There were originally appointed by the articles six directors of the company, of whom *James Bottomley*, the holder of 250 shares, was one.

These directors fixed three of their number as a quorum.

In June, 1877, a call was made upon the shareholders, but *Bottomley* made default in payment of the amount of his call.

Some time prior to the month of October, 1877, one of the six directors died. In that month, there being then only five directors, including *Bottomley*, *Bottomley* presented a petition for liquidation by arrangement, and a trustee was appointed.

In November, 1877, at their quarterly general meeting, the company passed, or purported to pass, a resolution that the business of the company should be carried on by not less than three directors and not more than seven, and that Article 35 should be altered accordingly by substituting the word "three" for "five."

It was admitted at the Bar that this resolution was invalid, as it was not passed in compliance with the requirements of Article 64.

In December, 1877, the four then acting directors (exclusive of

Bottomley) made a further call upon the shareholders, but neither *Bottomley* nor his trustee paid anything in respect of this call by the day appointed for payment, whereupon a notice was served upon them under the 6th article of association, requiring them to pay the two calls by a certain day on pain of forfeiture of the shares held by *Bottomley*.

Bottomley and his trustee having failed to comply with that notice, the four acting directors, in April, 1878, held a meeting, at which they passed a resolution declaring *Bottomley's* shares forfeited.

In December, 1878, the company passed resolutions for a voluntary winding-up, and appointed a liquidator.

In the course of the winding-up it turned out that there was a considerable surplus of assets, after satisfying all claims, available for division among the shareholders, whereupon *Bottomley*, whose liquidation proceedings had been closed, made a formal tender of the amount of his unpaid calls to the liquidator, and claimed the right to be restored to the register of shareholders and to participate in the distribution of these assets, contending that, having regard to the terms of the articles of association, the forfeiture of his shares by four directors only was *ultrà vires* and invalid.

In order to have the question decided, the liquidator then took out this summons under sect. 138 of the *Companies Act*, 1862, for a declaration that *Bottomley* was not entitled to be registered or treated as the holder of the shares in question; that such shares were duly forfeited, and that the assets remaining in the hands of the liquidator might be dealt with on the footing of such shares having been duly forfeited.

Chitty, Q.C., and *Romer*, for the liquidator:—

The shares have been duly forfeited. The 35th article of association is directory only—not imperative; and any act of the directors was good, provided it was in pursuance of a resolution passed at a meeting at which three, the quorum, were present: *Thames-Haven Dock and Railway Company* v. *Rose* (1). It could not have been meant that if the number of directors at any time, and from any cause, such as death, or otherwise, happened to fall

(1) 4 Man. & G. 552.

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below five, the whole business of the company should be stopped; and yet that must be the conclusion if the article is to be read as imperative; for the word "business" in Articles 35 and 45 must mean every kind of business, whether the forfeiture of shares or the execution of contracts.

[They also referred to *New Sombrero Phosphate Company* v. *Erlanger* (1).]

Seward Brice, for *Bottomley*:—

The object of the 35th article of association was to protect the interests of the shareholders by ensuring the management of their affairs being placed in the hands of at least five directors: five being the minimum number deemed necessary for conducting the business of the company; the call and forfeiture made by less than that number must, therefore, be deemed invalid: *Kirk* v. *Bell* (2); which was decided long after *Thames-Haven Dock and Railway Company* v. *Rose* (3). Directors cannot make a call or declare a forfeiture of shares unless all the requirements of the company's articles of association, whether as to the appointment of the directors, or otherwise, are fully complied with: *Garden Gully United Quartz Mining Company* v. *McLister* (4); *Johnson* v. *Lyttle's Iron Agency* (5).

Chitty, in reply.

JESSEL, M.R.:—

The first question is whether the call was well made; and the second question is whether the forfeiture was well made. As regards one of the calls—the second—it is admitted that at that time there were only four acting directors, the office held by Mr. *Bottomley* having been vacated by his insolvency; for, as he had liquidated by arrangement and his property had vested in a trustee, there is no doubt of his having been insolvent. At the next quarterly meeting a resolution was passed—which, it is admitted, was invalid—reducing the minimum number of directors

(1) 5 Ch. D. 73; 3 App. Cas. 1218.
(2) 16 Q. B. 290.
(3) 4 Man. & G. 552.
(4) 1 App. Cas. 39.
(5) 5 Ch. D. 687, 694.

to three, and under that invalid resolution the four acted as the only directors of the company, and under that invalid resolution made a second call and declared the forfeiture.

I think a great many of the observations made in the case to which I have been referred, of the *Garden Gully United Quartz Mining Company* v. *McLister* (1), apply to this case. In the first place it was decided that there must be properly appointed directors to make a call or declare a forfeiture. In the next place, it was held that when directors take their nomination from a meeting which illegally elected a full board, although some of those directors had been legally appointed before, they could not say they continued in office under their former appointment and reject the irregular and invalid resolution of the meeting which made them a full board—that they must be held to have been elected under that resolution.

In the present case, it seems to me very difficult for the liquidator to say—admitting that the resolution reducing the number of directors was invalid—that those directors did not act under that resolution. They clearly did so, and acted as four directors only.

The next question is whether a call or a forfeiture declared by those four directors is valid. The words of the 35th article of association are these: "The business of the company shall be conducted by not less than five, nor more than seven, directors." Very simple words. If there were no interpretation of them, I should hold them as equivalent to saying, there shall never be less than five nor more than seven directors. The words no doubt are, "the business of the company shall be conducted"; but they are meant to point out what the number of directors of the company shall be—not merely by whom the business of the company shall be conducted. It was so decided in *Kirk* v. *Bell* (2), where the words were practically the same as we have here; and therefore, if I wanted a decision in point, there it is. The words there were—instead of "the business of the company shall be conducted by"—"the management of the affairs of the company shall be entrusted to" (which, of course, is the same thing) "not less than five, nor more than seven, directors;" and it was held that there

(1) 1 App. Cas. 39. (2) 16 Q. B. 290.

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must be at least five directors. I agree that that is the fair meaning of the clause.

Now comes the question, that being the proper meaning of the clause, is it to be treated as directory only, or as obligatory? If there were no decision I should have said on principle that it could not be merely directory—it is a negative and an affirmative. The shareholders have entrusted the management of their business to a certain number of persons, not to any other number. They say, in effect, "there shall not be less than five, nor more than seven, who shall manage our business; less than five shall not be the managers." If, in an ordinary case, persons appointed seven people to be their attorneys, and said, "they shall conduct the business, not being less than five," would anybody say that if the attorneys were below five they could conduct the business? Is there any distinction between that case and this? Or take the case of a man going away and leaving his business to three clerks, and giving them power to act for him, and to draw bills, not less than two to act together—could any one of them draw bills? I do not see the distinction on principle. The contract of this partnership, or *quasi*-partnership, is that the business shall be managed by not less than a certain number of persons: what right has a Court of Justice to say that it shall be managed by a less number, without the shareholders being consulted? That is what it comes to, for it is admitted that the resolution reducing the number of directors was not binding on the company. It appears to me, irrespective of authority, that the principle is clear.

Then the argument of inconvenience is adduced. Now I have always said, and I am repeating, I am afraid, what I have been compelled to repeat over and over again, that the argument of inconvenience is a very strong argument where the construction of a document is ambiguous—where it is fairly open to two constructions. Then the argument of inconvenience, like the argument of absurdity, may be used with great force; but when the construction is clear beyond controversy, it is no answer to say that there are some consequences of that construction which will cause inconvenience and were probably not contemplated by the framers of the documents. It is said that if there were five directors only, and one died suddenly before a quarterly meeting,

there might be an interval during which the business of the company could not be conducted. The answer is, the company should have started with seven, the full number; then it would not have been very likely that the number would be reduced to less than five in the intervals between the quarterly meetings. Or they could have called a special meeting, and so provided for the continuance of the business.

I will now proceed to consider two cases, by both of which I should be bound, because they are decisions of the Court of Common Pleas and the Court of Queen's Bench respectively, and have been decided long ago. If they were inconsistent, then the second decision, *Kirk* v. *Bell* (1), which was in 1851, would of course be binding on me as distinguished from the first decision, *Thames-Haven Dock and Railway Company* v. *Rose* (2), which was in 1842; but I do not think they are inconsistent.

The question in the *Thames-Haven Dock and Railway Company* v. *Rose* was one of construction. As I read the decision, two of the Judges held the words there to be directory—great Judges they were, Chief Justice *Tindal* and Mr. Justice *Maule;* but at the same time the decision of the Chief Justice did not turn on that. It turned on this, that if there were any grounds to dispute the debt they should have been pleaded. There was a good debt admitted, and it was too late, after judgment, for the defendant to take advantage of it. But the Chief Justice did say in the middle of his judgment, that he thought it was a matter of direction only. Mr. Justice *Maule* says: "The question depends upon sects. 109, 110, 111, and 112,"—which he read; and then he says, "It appears to me that the provision referred to is a mere arrangement as to the internal affairs of the company, and that it does not apply to their external affairs, or prevent them from enforcing calls that have been duly made." But here the question is whether the call has been duly made. I will now go to the sections which were referred to by the Judges in that case, because it appears to me the case is quite distinguishable from this. The 108th section, on which it turned, said that "The business and concerns of the company shall be carried on under the management of twelve directors, to be chosen," and so on. It did not give the minimum

(1) 16 Q. B. 290.
(2) 4 Man. & G. 552, 560.

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and maximum as here, and it was equivalent, in my opinion, to saying that "the number of directors shall be twelve." But then sect. 109 went on to provide that nine individuals should be the first directors of the company until the first general meeting, shewing that the business might be carried on by nine and not by twelve. The next section, the 110th, provided that "Any director who shall, by ballot or rotation, go out of office, may be immediately or at any future time re-elected." The 111th section said that no person holding any office under the company, or being concerned or interested in any contract, should be capable of being a director, or should act—that he should vacate his office and be disqualified. Then there was a clause that until his disqualification was communicated, his acts should be binding. Sect. 112 was that when any director should die, or resign, or become disqualified, and so forth, or should cease to be a director by any other means than going out of office, it should be lawful for the remaining directors to elect some other proprietor, and every such proprietor should continue in office so long only as the person in whose stead he was elected would have been entitled to continue in office had he lived and remained in office. Then the 116th section said that the directors for the time being should meet, and that they should not be competent to determine on any business unless at least five directors should be present. Now all these sections shewed this, that it was meant that the number of directors was to be twelve; not, however, that no business was to be transacted unless there were twelve, but it meant that no business was to be transacted unless there were five present; and that shews the distinction between having a minimum and a maximum, and simply stating the number. When the mere number of directors is stated, and then there are provisions shewing that the directors are to meet during vacancies to fill up the number, and that they may transact business with a less number, and so on, it is obviously meant that the larger number shall be the number of directors as the normal number, but not that business shall not be carried on with a less number. But that has no application when you find a clause that the number shall never be less than a certain number.

The present question does not arise very often in the case of com-

panies, but it has arisen very often in the old Court of Chancery as regards charity trustees. In a great number of cases the point has been decided that where the foundation deed says the number of trustees shall be so and so, it does not prevent their acting with a reduced number; but when it says that, when the number comes to be reduced to a certain number, they shall fill up vacancies, they are compelled to fill up that number when the number becomes reduced; or if it says they shall only act not being less than a certain number, it is considered to be of the essence that not less than that number shall act. The same observation applies to a quorum. When you say "the quorum of directors shall be three," what does that mean? Stated in full, it amounts to this, that "no business shall be transacted unless there shall be three directors present." That is the meaning of a quorum. If it is said that is directory only, the answer is, it is not: it is of the very essence of the authority that there shall not be less. It appears to me that *Kirk* v. *Bell* (1) is a distinct authority in favour of this; and to shew how distinct it is, although the ultimate decision turned on a clause in the company's deed as to ordinary business, I will refer to what Lord *Campbell* says. There a particular deed was executed by four directors. As in this case, there had been five directors, and they were reduced to four. The deed having been executed by the four, it was said that it did not bind the company, and so the Court held. Lord *Campbell* said, "It lay on the plaintiff to prove that those who executed the deed had authority. It seems to me that he failed to shew this; for though it was executed by all the directors, they were only four in number. In the deed of the company we find this clause." His Lordship read it, and it was as follows: "That the management of the affairs of the company shall be intrusted to such a number of directors as the shareholders shall for the time being deem expedient, so that it be not less than five nor more than seven, and the number at present deemed expedient and hereby appointed is five." Then he says, "If this regulation stood alone, at least five directors would be required, and four were not sufficient." So that he did not decide the case solely on the second ground, that there was a provision for ordinary business, but on the first

(1) 16 Q. B. 290.

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ground also, that if the regulation stood alone, four were not sufficient. Then Mr. Justice *Patteson*, proceeding upon the clause relating to ordinary business, says this is not ordinary business; and then Mr. Justice *Coleridge* says this: "We must look to the deed of settlement to see what authority is given; for the individuals who become shareholders do so under the agreement contained in that deed. Assuming, what I do not say, that three directors out of four might exercise the powers of a board meeting, those powers are only for the transaction of ordinary business. . . . . But it is not clear that three out of four could transact ordinary business. It is analogous to many cases; a familiar one is the submission to three arbitrators, any two of whom may make the award: in which case an award made at a meeting of two is not good unless the third had power to attend and join if he pleased."

It is obvious from that very cautious judgment that Mr. Justice *Coleridge* thought that even ordinary business could not be transacted, nor was he frightened at that result. Then Mr. Justice *Wightman* says the same thing in rather plainer terms: "It seems to me that the interest of the shareholders has been too much lost sight of in the argument. The shareholders stipulate for, and are entitled to have, the supervision of at least five directors."

In the present case the shareholders have entrusted the management of their affairs to a certain number of managing partners, and they have stipulated that there shall not be less than a certain number. As I have said before, on principle I think that must be the conclusion; but still I am very glad to find that the last authority is tolerably clear to the same effect.

I therefore decide that these four directors neither had the power to make the second call nor to enforce the forfeiture; consequently the forfeiture is void. Mr. *Bottomley* is accordingly entitled to participate with the other shareholders in the distribution of the surplus assets, subject, however, to the payment of his calls to the liquidator.

Solicitors: *Milne, Riddle, & Mellor; Phelps, Sidgwick, & Biddle*, agents for *Sale, Seddon, & Co., Manchester.*

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[1880 L. 55.]

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Settlement—Will—Testamentary Appointment—Partial Invalidity—Appointment of Share of Trust Fund—Contingent Interest—Postponed Enjoyment of Capital—Intermediate Income.

Where a testator, having a power of appointment over personalty, appoints a share of the fund to an object of the power upon the happening of a certain event, the appointment carries with it all the intermediate accretions to that share, whether in the shape of income or otherwise.

Under a settlement made on the second marriage of *M.*, a widow, a trust fund belonging to her was vested in a trustee upon trust for her three children, *nominatim*, in such shares as she should by deed or will appoint, and in default of appointment, for such three children equally.

By her will *M.* appointed that the trustee of the settlement should stand possessed of the trust fund, as to one-third part thereof, upon trust to pay the income thereof to her son *C.* (an object of the power) during his life, or until anticipation; and from and after his death or the determination of his estate, upon trust to pay the said one-third part to her grandson (not an object of the power) when he should attain twenty-one; and in case he should die before he should attain twenty-one, upon trust to pay the said one-third part to her daughter *S.* (an object of the power).

C. survived the testatrix and died, the grandson being then an infant:—

Held, that, although the appointment to the grandson was void, the appointment over to *S.* was good, and that the income from *C.*'s death of the one-third so appointed would pass with the capital to *S.*, if the grandson died under twenty-one; but that, if that event did not happen, both income and capital would pass under the settlement as in default of appointment.

BY the settlement made in 1868, upon the marriage of *George Camfield* and *Martha Long*, widow, certain real estate belonging to the said *Martha Long* was conveyed to a trustee upon trust for sale and investment of the proceeds; and to hold the trust funds after the deaths of the said *George Camfield* and *Martha Long* upon trust for *Martha Long*'s three children, *Charles Long*, *Albert Long*, and the Defendant *Sarah Ovenden* (then *Sarah Long*), and also the children of the then intended marriage in such shares as the said *Martha Long* should by deed or will appoint; and in default of such appointment, in trust for the said three children, and also the children of the then intended marriage, in equal shares.

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Martha Camfield survived *George Camfield* and died in 1878, having made her will, dated in 1876, whereby, in intended exercise of the power given to her by her said settlement, she appointed that the trustee of the settlement should stand possessed of the trust funds comprised therein upon trust, as to one third part thereof, to pay the annual produce thereof unto her son, the said *Charles Long*, during his life, or until he should anticipate the same as therein mentioned; and from and after the death of her said son *Charles* or the determination of the estate thereinbefore limited to him, upon trust to pay the said one-third part to her grandson, *Arthur Long* (not an object of the power), the son of her said son *Charles*, as and when he should attain the age of twenty-one years: and in case her said grandson *Arthur* should die before he should attain the age of twenty-one years, upon trust to pay the said third part to her daughter, the Defendant *Sarah Ovenden*, for her sole and separate use: and as to the remaining two-thirds, upon trust as therein mentioned.

There was no issue of the marriage of *George Camfield* and *Martha Camfield*.

Charles Long died on the 2nd of January, 1880, intestate, whereupon this action was brought by his widow and legal personal representative against *Mark Ovenden*, the present trustee of the settlement, the said *Sarah Ovenden* his wife, and the said *Arthur Long*, who was an infant of the age of nine years, for the execution of the trusts of the settlement, and for a declaration that the appointment made by the will of *Martha Camfield* in favour of the Defendant *Arthur Long* was void, and that the share so appointed went as in default of appointment.

The action now came on for trial.

It was admitted at the Bar that the appointment of the one-third of the trust fund so far as it extended to *Arthur Long* was void, he not being an object of the power, and the only question really was as to the destination of the income of this one-third from the death of *Charles Long*.

Badnall, for the Plaintiff:—

The appointment of the one-third to *Arthur* was clearly bad, though the appointment or gift over to *Sarah*, an object of the

power, was good: *Alexander* v. *Alexander* (1). But that gift over fails or takes effect according to the event: *Crompe* v. *Barrow* (2). So that *Sarah* takes only in case *Arthur* happens to die under twenty-one: if he does attain twenty-one, then the one-third must go as in default of appointment. The question is, whether the income of this one-third, from the death of *Charles*, is also appointed, subject to the same contingency. I submit it is not, and that from *Charles'* death it passes under the settlement as unappointed. The appointment is wholly silent as to the intermediate income between the death of *Charles* and the time for payment of the capital: this income therefore remains disposed of only by the settlement. Then, again, the gift of this one-third must be treated as a gift of a legacy payable at a future day, and therefore as carrying interest only from the time fixed for its payment.

[He also referred to *Lord* v. *Lord* (3), *Genery* v. *Fitzgerald* (4), and *Countess of Bective* v. *Hodgson* (5).]

Chitty, Q.C., and *Rigby*, for the Defendants.

JESSEL, M.R.:—

The first question is really not arguable. The trust is to pay one-third part of the settled trust fund, after the cesser of enjoyment by *Charles* to the grandson, as and when he should attain twenty-one; and in case he should die before attaining twenty-one, then over. Of course the appointment to the grandson is void, he not being an object of the power; but the appointment, if he dies under twenty-one, in favour of an object of the power will take effect as being within the limits of the rule as to remoteness.

The only question remaining is, what becomes of the income of the one-third after the death of *Charles* until the event happens of the grandson attaining twenty-one or not? Is it unappointed, or does it go with the capital? I have no doubt that it goes

(1) 2 Ves. Sen. 640.
(2) 4 Ves. 681.
(3) Law Rep. 2 Ch. 782, 789.
(4) Jac. 468.
(5) 10 H. L. C. 656.

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with the capital. The first question to be considered is, what is the capital? It is a part of an ascertained trust fund. It is as specific a thing as you can well have. Treating the well-settled doctrine of a gift of a specific legacy as analogous, we find that if you give a specific legacy with a postponed enjoyment it carries intermediate income. If £10,000 consols standing in the name of the testator, and so described, is given to *A.* on his attaining twenty-one, *A.*, on attaining twenty-one, gets the £10,000 consols as from the testator's death. That is settled, because it is considered to be severed at the death from the rest of the testator's estate. Indeed, as regards general legacies, where there is a severance complete as from the death, they carry interest from the death, and not from the end of twelve months, on this principle, that they are severed and taken away, and distinguished from the general property of the testator. Consols, however, may be regarded as a perpetual annuity redeemable, and therefore do not afford the best possible illustration.

The same principle would follow, I presume, if a man gave a flock of sheep to be delivered to *A. B.* on his attaining twenty-one. I suppose the intermediate increase of the flock would pass. Nobody could say that the lambs which were born in the meantime fell into the general estate of the testator; and so I suppose it would be in any other case where income or any other accretion accrued to the specific article, whether what was given was a chattel or a security. If, then, that is so—if the principle is that such a gift is a gift of a severed fund or legacy, and is to be so treated, what is the difference between that and an appointment of a third of a fund comprised in a particular settlement? It is just as distinct and specific. No one could deny that if, instead of it being subject to a power only, this property had been the absolute property of the testatrix, and she had given it in these words, "one-third of the funds comprised in such settlement," that would have been a specific legacy; and it is, in my opinion, not less specific for the purpose because it is given as part of a fund over which she had a power of appointment. I should say that when you give a third share of a fund over which you have a power of appointment to *A. B.* at twenty-one, it carries with it the whole accretions of that share of the fund in the

meantime, whether in the shape of income or otherwise—I say "or otherwise" because you may have accretions as regards personal estate of a totally different kind. If the fund consisted of railway stock, you might have an allotment made by the company in respect of the railway stock, or you might have bonuses if the fund consisted of shares or stocks in other companies, and so on. It appears to me that the whole of the accretions, whether strictly income or not, pass by the description of the thing given, appointed, or bequeathed, and consequently the intermediate accretions pass.

If I turn from general principle to the words of this appointment, I think they very much favour the view I have expressed. The testatrix first of all appoints one-third of the trust fund upon trust to pay the annual income thereof to her son *Charles* for life, or until he anticipates; and "from and after"—that is, immediately after—the death of her said son *Charles*, or the determination of his estate, upon trust to pay such one-third to the Defendant, *Arthur Long*, upon his attaining twenty-one. The words "from and after" would have no meaning unless they carry the intermediate income. It is the only sense in which the trustees can pay the one-third "from and after"—that is to say, from the moment of *Charles'* decease or cesser of interest: on that event the one-third is separated or set apart and given to *Arthur Long* upon his attaining twenty-one. If one had to depend upon the wording, I should say it is clear that from and after the death or cesser of interest one-third is to be set apart and to be paid over to *Arthur Long* when he attains twenty-one, and that would carry the income to *Arthur;* but if he should die before attaining twenty-one, then the trust is "to pay the said one-third part" to the daughter—that is the one-third part *Arthur* would otherwise have taken. Whether *Arthur* attains twenty-one or not, the accumulation of income of one-third part still goes on from and after the death of *Charles* or cesser of his interest, and it is the same part which is to go to the daughter. What is given to the daughter is in fact the same thing that is given to *Arthur:* so that if *Arthur* dies under twenty-one, then the income goes, from the cesser of *Charles'* interest, with the capital to the daughter. If, however, *Arthur* attains twenty-one, then the appointment to the daughter

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fails to take effect, and both income and capital pass under the settlement as in default of appointment.

Solicitors: *Sole, Turner, & Knight*, agents for *W. C. Cripps & Son, Tunbridge Wells; Collyer-Bristow, Withers, & Russell*, agents for *Stone & Simpson, Tunbridge Wells.*

M. R. 1881 March 19.

In re METHUEN AND BLORE'S CONTRACT.

Will—Codicil—"Everthing I am possessed of"—"I give and devise"—"Residuary Legatee"—No Real Estate at Date of Will or Codicil—After-acquired Real Estate—Residuary Devisee—Intestacy as to Real Estate—Vendor and Purchaser Act, 1874.

A testatrix, by her will, dated in 1854, gave as follows: "I commit to paper my wishes respecting the disposal of my property. . . . Everything I am possessed of I leave to my sister for her life, after her decease I give and devise as here annexed." Then followed a number of legacies, and the will proceeded: "My two nephews, *H. H. M.* and *F. P. M.*, I leave my executors, and the latter residuary legatee after the demise of my sister."

She also executed a codicil, but she had no real estate either at the date of the will or codicil. She afterwards purchased some freehold property, which she held at her death.

F. P. M. contracted for the sale of part of the real estate as absolute owner, and an objection having been taken by the purchaser that he had no title:—

Held, that there was not sufficient context in the will to enable the Court to read the words "residuary legatee" as "residuary devisee," and that, consequently, the real estate did not pass to *F. P. M.*

Hughes v. *Pritchard* (1) distinguished.

THIS was an application under the *Vendor and Purchaser Act*, 1874.

Dorothy Plumptre, spinster, made her will, dated in 1854, which, so far as is material, was as follows:—

"I commit to paper my wishes respecting the disposal of my property, and give this as my last will and testament. Everthing I am possessed of I leave to my dearest sister *Sophia Plumptre* for her life. After her decease I give and devise as here annexed." Then followed a number of pecuniary legacies, and the will proceeded as follows: "My two nephews *H. H. Methuen* and *F. P.*

(1) 6 Ch. D. 24.

Methuen I leave my executors, and the latter residuary legatee after the demise of my sister;" and then followed other legacies, as to one of which the word "devise" was used.

The testatrix, in 1869, made a codicil to her will, which only referred, however, to certain of the legacies given by her will.

The testatrix had no real estate either at the date of the will or codicil, but subsequently to the execution of the latter she purchased some freehold property which she held at the time of her death.

F. P. Methuen having contracted to sell part of the real estate as absolute owner, an objection was taken by the purchaser that he had shewn no title to it, and a summons raising the question was taken out under the *Vendor and Purchaser Act*, 1874, which had been adjourned into Court and now came on for argument.

Whitehorne, in support of the summons:—

The words with which the testatrix commences her will, namely, "I commit to paper my wishes respecting the disposal of my property," clearly shew that she meant to deal with the whole of her property, whatever it might be. The fact that she had no real estate at the date of her will is wholly immaterial, and cannot be taken into consideration, as the will dates from her death.

The words "everything I am possessed of I leave to my sister for her life," followed by the appointment of *F. P. Methuen* as "residuary legatee" after the demise of her sister, pass the real estate to him.

The decision in *Hughes* v. *Pritchard* (1) is directly in my favour. In *Davenport* v. *Coltman* (2) the words "it is my will and pleasure that *M. U.* and *C. C.* shall divide equally between them as residuary legatees whatever I may die possessed of" were held to pass real estate to them.

In *Pitman* v. *Stevens* (3) the gift was, "I give and bequeath all that I shall die possessed of, real and personal, of what nature and kind soever," followed by the words, "I appoint *P.* my residuary legatee and executor," and it was held that the testator's

(1) 6 Ch. D. 24. (2) 12 Sim. 588; 9 M. & W. 481.
(3) 15 East, 505.

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intention was to make *P.* residuary legatee of his real estate in fee.

If a testator gives all his property, which I submit this testatrix by the expressions she has used has done, that passes everything real and personal; and the effect of the gift to pass everything she possesses cannot be made less because the person taking is described under the name of "legatee." No doubt the words "residuary legatee" *primâ facie* have reference to personal estate only; but there is no magic in the words, and they may be so used by a testator as to be construed as referring to real estate. In *Kellett* v. *Kellett* (1), in which case Lord *Eldon* declared his mind to be in "a state of infinite doubt," the question was whether there were or were not circumstances that would enable him to put a construction, or rather to say that the testator had put a construction, on the words "residuary legatee" different from that which they ordinarily import; and he thought there were not. I submit that in this case the testatrix has put a construction on those words, and that the real estate passes under them to *F. P Methuen.*

[He also cited *Windus* v. *Windus* (2); *Thomas* v. *Phelps* (3); *Warren* v. *Newton* (4); *Singleton* v. *Tomlinson* (5).]

Wintle, for the purchaser:—

The first words of the will are merely interlocutory, and as such passed nothing. There is no gift of real estate to any person either in form or substance. It is a good clear will, and deals only with personal estate, and the words "residuary legatee" must be construed according to their ordinary meaning.

[He was stopped by the Court.]

JESSEL, M.R.:—

I must begin by stating a fact which to my mind is not without importance, namely, that at the date of the will the lady had no real estate; I say that is not without importance, because, although there is a presumption against a person who makes a will dying

(1) 3 Dow. 248.
(2) 6 D. M. & G. 519.
(3) 4 Russ. 348.
(4) Dru. 464.
(5) 3 App. Cas. 404.

intestate as to any part of the property which he has, that presumption is not so strong as regards property which he has not; and which, as far as we know, he has no intention of acquiring. That does appear to me to be not immaterial. I do not say it is very material or very strong, but it is not immaterial. It does weigh as regards the observation as to a person not dying intestate.

Now, this lady having only personal estate begins her will in this way: "I commit to paper my wishes respecting the disposal of my property"; that does not dispose of her property, it is only her "wishes respecting the disposal of my property." It does not follow that her wishes would dispose of the whole of her property. It may well be that her wishes up to that time only related to part of the property, and still those words are fulfilled. It is only her wishes as to the disposal of it, and indeed it is different from the will we have in *Hughes* v. *Pritchard* (1), because there it was "as to my estate which God has been pleased in his good providence to bestow upon me, I do make and ordain this to be my last will and testament as follows, that is to say." I read that to mean, "I do by this my will dispose of all my estate real and personal; I intend to do it, and I give it as follows"; whereas here the testatrix is only committing to paper her wishes respecting the disposal of her property. Her wishes may have fallen short of the disposal of the entirety. Therefore, to that extent *Hughes* v. *Pritchard* is distinguishable. But even assuming it is not distinguishable, I will read an extract from the judgment of Lord Justice *Bramwell*, in preference to my own for a very obvious reason—he says: "The testator begins by saying, 'As to my estate I do make and ordain this my last will and testament.' Mr. *Rigby* made a suggestion that the word 'whole' was not there, but I have always understood that when you speak of a thing you need not amplify the expression by using the word 'whole,' and that when a man says 'As to my estate,' it is the same as if he had said, 'As to the whole of my estate.' But it is true that though he says 'I ordain this to be my last will and testament,' if he had omitted to dispose of any portion of it, it would follow then that the intention he had expressed would be

(1) 6 Ch. D. 24, 28.

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unfulfilled as to a part of his estate;" so that even with these words, he does not take them to mean, as I thought they did mean, in that particular will, "I do dispose of all my estate." The words are "as to my estate I do make and ordain this my last will and testament;" the Lord Justice did not read them to be of so great importance, and thought it was not equivalent to "I do dispose of all my estate."

But the question in *Hughes* v. *Pritchard* turned on the use of the words which we have not got here; that is, we have no direct gift of real property. Now, in *Hughes* v. *Pritchard* (1) I said this, "That being so, and finding in the will a disposition of parts of his property"—real property it should be, but that has slipped out of the report, or perhaps I did not use it, but that is what it meant—"with that appointment of residuary legatees, why are we not to say that the expressions in the former part of the will are entitled to as much consideration as the expressions in the latter part, and that he intended these three people to take the residue of his property?" That is, of course, his real property. Then Lord Justice *James* puts it on that ground expressly, and so does Lord Justice *Bramwell;* so that when you come really to examine the case it did turn on the fact, not merely of the general words at the beginning, but of the gift of real property found in the will—undoubtedly the gift of real property.

Now, in this case before me, I have nothing, as I said before, but a statement of a committal to paper of the wishes of the testatrix respecting the disposal of her property. I am repeating myself, but these wishes may not extend to the disposal of the whole of the property. It is not like saying, "as to the property I am possessed of or entitled to I dispose thereof as follows." I think these are words which give me very little assistance. Then she goes on, "Everything I am possessed of I leave to my sister *Sophia Plumptre* for her life." In my opinion, having regard to the *Wills Act,* and having regard to the expressions used, *Sophia Plumptre* does take this property for life; I wish to say that distinctly—I do not wish to be misunderstood, but she takes it because she takes everything. There is nothing I can find to cut down the meaning of the word "everything"—"everything I am

(1) 6 Ch. D. 24, 27.

possessed of." Why should it not mean everything? But although everything is left to a person for life, it does not follow that everything is to be left after her decease. I may put it in another way. Although words have been used which either, having regard to their natural meaning or having regard to the operation of the *Wills Act* (because the *Wills Act* comes in as regards real property), would pass everything she had to her sister for life, there is no indication of an intention, to my mind, to shew that the remainderman must necessarily take all that is given to the tenant for life. It would, to my mind, have made a very great difference if specific freehold property had been given by the will itself, and then the residue given over. We have not got that here. All we find is, that after the death of the sister there are a great number of pecuniary legacies or specific legacies consisting of personal estate, and then the appointment of the executors, and *F. P. Methuen* as "residuary legatee," and then another long string of legacies.

It does not appear to me that there is in this will that amount of context which is necessary to give to "residuary legatee" the meaning of "residuary devisee." If I were asked as to the testatrix's own intention, I should have very little doubt about it.

The cases are not in a satisfactory state, and I should be glad, therefore, to encourage an appeal in this case, and as the purchaser has succeeded I dismiss the summons with costs.

Solicitors: *Bridges, Sawtell, Heywood, Ram, & Dibdin; Philpot & Son*, agents for *Morrell & Son, Oxford.*

M. R.

1881

March 24.

In re MADRAS IRRIGATION AND CANAL COMPANY.

Company—Winding-up—Transfer of pending Action—Jurisdiction—Rules of Court, 1875, *Order* LI., *rr.* 1, 2*a*.

When an order has been made by a Judge of the Chancery Division for the winding-up of a company under the Companies Acts, 1862 and 1867, the Judge in whose Court such winding-up shall be pending has no jurisdiction, under Order LI., rule 2a, to order the transfer to him of an action pending against the company in another Court of the same Division: such a transfer can only be made by the Lord Chancellor under Order LI., rule 1.

In re Landore Siemens Steel Company (1) not followed.

THE *Madras Irrigation and Canal Company* were the Defendants in a debenture-holder's action pending in the Court of Vice-Chancellor *Bacon*.

An order for the winding-up of the company having been made in the course of the action by the Master of the Rolls,

A. Young now applied, on behalf of all parties, that the action might be transferred to this branch of the Court, under Rules of Court, 1875, Order LI., rule 2a, and cited *In re Landore Siemens Steel Company* (1) as an authority.

JESSEL, M.R.:—

The case cited is an instance of a mistake on the part of counsel, transmitted to the Judge, and adopted by the reports. Of course, the order for transfer, under the rule referred to, can only be made when the action is pending in "any other Division"—not in another Court of the same Division. You must apply to the Lord Chancellor for an order for transfer, under Order LI., rule 1 (2).

Solicitors: *Ashurst, Morris, Crisp, & Co.*

(1) 10 Ch. D. 489.

(2) *See* Memorandum, 1 Ch. D. 41.

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V.-C. H.
1880
Nov. 16.

[1879 P. 240.]

Railway Company, Taking of Lands by—Lands Clauses Consolidation Act, 1845, *ss.* 7, 9—*Persons absolutely entitled, Sale by Trustees for—Trustee appointed Surveyor—Power of Sale, Determination of.*

A testator devised and bequeathed his residuary estate (which comprised freehold lands, in respect of which a notice to treat was given by a railway company before the death of the testator) to the use of trustees and their heirs in trust for his wife for life, and after her death to pay and assure the same unto his two married daughters, in equal shares, for their separate use as tenants in common, with a gift over in favour of their respective issue in events which did not happen; "and for the purpose of division" he empowered his trustees to sell his residuary estate; and he declared that his trustees should be entitled to be paid for all business done by them in relation to his estate.

The testator's wife, his two daughters and their husbands, all survived him; and after the death of the widow the trustees sold and conveyed the lands to a railway company for a price which had been determined by the valuation of two surveyors, as provided by the 9th section of the *Lands Clauses Consolidation Act*, 1845; the trustees having first, for the purpose of making such valuation, appointed one of themselves as the surveyor on their behalf. One of the testator's daughters disputed the validity of the sale, and brought an action to restrain the company from taking or using the lands:—

Held, first, that under the 7th section of the *Lands Clauses Consolidation Act*, 1845, both trustees for *femes covertes* entitled for their separate use, and also such *femes covertes* themselves, are persons competent to contract with a railway company for the sale of lands; but that a railway company with notice that a *feme coverte* so entitled objected to a sale by her trustees, and was willing herself to contract, could not safely take a title from the trustees only.

Secondly. That the appointment by trustees of one of themselves as the surveyor to make on their behalf the valuation required by the 9th section of the *Lands Clauses Consolidation Act*, 1845, is sufficient to invalidate a sale under the Act.

Thirdly. That trustees cannot sell under the Act at a price to be deter-

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mined by valuation, but must first fix the price by agreement, and then ascertain its sufficiency by valuation.

Fourthly. That the power of sale given to the trustees by the will determined upon the death of the testator's widow, because the *femes covertes* then became absolutely entitled for their separate use, and the property was "at home."

Affirmed on appeal 18 Ch D 429

IN April, 1878, the *Lewes and East Grinstead Railway Company*, under the powers of their special Act, which incorporated the *Lands Clauses Consolidation Act*, 1845, gave to *Thomas Hopkinson* notice to treat for the purchase of part of a freehold house and grounds called *Kingscote*, near *East Grinstead*, of which he was owner in fee simple. *Thomas Hopkinson* shortly afterwards gave the company particulars of his claim, but he died before anything further had been done, on the 28th of July, 1878. By his will, which was dated in May, 1874, he appointed his son-in-law, *John Gaines*, and his friends *W. R. M.* and *G. H. B. Glasier*, executors and trustees of his will; and, after bequeathing certain legacies, he gave all the residue of his estate, both real and personal (which included his *Kingscote* property), unto and to the use of his trustees, their heirs, executors, administrators, and assigns, upon trust to pay the net income thereof to his wife *Caroline* during her life, and after her decease upon trust to pay, transfer, assign, or otherwise assure the same unto his two daughters, *Caroline A. Gaines* (the wife of the said *John Gaines*) and the Plaintiff, *Catherine Susan Peters*, in equal shares, for their separate use as tenants in common; and if either of his said daughters should have died without leaving issue who should attain the age of twenty-one years, then upon trust for the separate use of such surviving daughter; and if either or both of his said daughters should die leaving issue, such issue should be entitled to their, his, or her parent's share, as well original as accruing, on their, his, or her attaining the age or respective ages of twenty-one years, with benefit of survivorship between them, or any one or more of them, dying under that age; and, "for the purpose of division," the testator thereby empowered his said trustees, or the survivor or survivors of them, his or her executors, administrators, or assigns, to sell all his said residuary estate by public auction or private contract; and he declared that

his trustees should be entitled to charge and to be paid out of his trust estate for all business (whether strictly professional or not) done by them in relation to his said trust estate in the same manner as if they had not been trustees. The will contained a power of leasing, and the usual maintenance and advancement clauses.

The testator left his wife *Caroline* and his two daughters, the Plaintiff and the said *Caroline A. Gaines*, and their husbands, him surviving; and *G. H. B. Glasier* having renounced and disclaimed, his will was proved by *John Gaines* and *W. R. M. Glasier* only.

On the 9th of January, 1879, the two trustees served a notice on the company requiring them to purchase the whole of the *Kingscote* property, on the ground that the same was a "house" within the meaning of the 92nd section of the *Lands Clauses Consolidation Act*, 1845, and in the same month they and the widow of the testator commenced an action against the company in order to compel them to take the whole of the *Kingscote* property. In that action an order was made on the 16th of January, 1879, for the payment into Court by the company of a sum of £4950 pending the decision of the action, with liberty to them in the meantime to take such part of the *Kingscote* property as they required for the purposes of their undertaking. On the 29th of January, 1879, the life interest in the property under the testator's will, determined by the death of his widow, and the reversionary interests of his two daughters fell into possession. Shortly afterwards the company communicated to the trustees their willingness to take the whole of the property, and on the 25th of February, 1879, they gave them notice of the summoning of a jury to determine the purchase-money under the provisions of the *Lands Clauses Act*, 1845, and at the same time offered the sum of £3300 for it.

The trustees did not accept this offer, but entered into negotiations with the company for a sale by private contract, and agreed that the purchase-money to be paid for the property should be determined by the "valuation by two able practical surveyors," in accordance with the 9th section of the *Lands Clauses Act*. One of the two trustees, viz., Mr. *W. R. M. Glasier*, happened to be a surveyor, and accordingly Mr. *Gaines* and Mr.

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W. R. M. Glasier appointed Mr. *W. R. M. Glasier* to act as their surveyor for the purposes of the valuation, and the company appointed a surveyor on their behalf. The two surveyors thus appointed made their valuation on the 3rd of March, 1879, and thereby determined the purchase-money to be £3400 and the surveyor's fee to be £100.

The Plaintiff and her husband, however, were dissatisfied with the price to be paid by the company, and refused to concur in the sale, requiring that the purchase-money should be ascertained in manner prescribed by the *Lands Clauses Act;* and they gave both the trustees and the company formal notice to this effect.

On the 17th of July, 1879, an order was made in the action brought by the trustees against the company, in pursuance of which £3400, part of the £4950 paid in, was carried over to answer the purchase-money, to the credit of the company, in the matter of their special Act, "The estate of *Thomas Hopkinson,* deceased," and the balance was paid to the company.

The property was subsequently conveyed to the company by an indenture dated the 22nd of August, 1879, to which the trustees and the company were the only parties.

By this indenture, after reciting, *inter alia,* the will of the testator including the power of sale, that under the powers of their Act the company had contracted and agreed with the trustees for the purchase of the property in fee simple in possession free from incumbrances, and that it was agreed that the purchase-money and compensation should be determined by the valuation of two able practical surveyors, and that *Harry Jones* and the said *W. R. M. Glasier,* being two able practical surveyors duly appointed, had determined the purchase-money and compensation at £3400, and that, pursuant to an order in the action, the company had paid that sum into Court to an account of *Ex parte* the company In the matter of their Act, "the estate of *Thomas Hopkinson,* deceased," and that the company had required *Gaines* and *Glasier* to make such conveyance as was thereinafter contained; It was witnessed, that in pursuance of the agreement and in consideration of the sum so paid, *Gaines* and *Glasier,* "in exercise of the powers for this purpose given to them by the *Lands Clauses Consolidation Act,* 1845, or otherwise," granted the property, and

all such estate and interest therein as they were possessed of or entitled to, or were by the said Acts of Parliament or any or either of them "or otherwise" empowered to convey, to the company, their successors and assigns for ever.

In pursuance of an order made in the action by the trustees against the company on the 28th of November, 1879, upon the motion of Mr. and Mrs. *Gaines*, a moiety of the £3400 in Court in that action was paid out to them, and the other moiety was carried over to the credit of the Plaintiffs.

Meanwhile, *i.e.*, on the 26th of July, 1879, the Plaintiff, Mrs. *Peters*, and her husband, had brought the present action against the company, in which they alleged that the sum of £3400 was a totally inadequate price for the property, and claimed an injunction to restrain the Defendants from entering upon or using the property, or executing any works thereon, until the amount of purchase-money or compensation payable for the property, or the estate or interest of the Plaintiff therein, should have been duly determined and paid, or secured; and they also claimed damages in respect of the taking of the property by the company otherwise than in accordance with their statutory powers.

Upon the Plaintiff's case being opened, the Vice-Chancellor, learning that the validity of the sale was disputed, declined to try the question as to the adequacy of the price. The attendance of the witnesses as to value was then dispensed with, and the arguments were confined to the questions of law.

Kekewich, Q.C., and *Shebbeare*, for the Plaintiff:—

The power of sale conferred by the will was for a specific object, *i.e.*, "for the purpose of division," presumably amongst the issue in case any should take under the substitutional gift, and it never came into operation; but if it did, it ceased upon the death of the testator's widow, when the life interest determined and the testator's daughters became absolutely entitled for their separate use as tenants in common. The trustees therefore could not sell under the will, nor did they purport to do so by their conveyance. Neither could they sell under the *Lands Clauses Consolidation Act*, 1845, for the 7th section of that Act only enables trustees to sell and convey on behalf of *cestuis que trust* under disability, while

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these ladies were fully competent themselves to sell and convey to the company, and indeed were expressly empowered to do so as "married women seised in their own right." But if the trustees had power to sell under the Act, they could only exercise that power in accordance with the provisions of the statute, and the appointment of one of themselves as the surveyor to make the valuation required by sect. 9 is contrary to the intention of that Act, which is that the trustees should themselves fix the price and then test its sufficiency in the manner pointed out by the 9th section. There has, therefore, been no proper valuation, and the sale is invalid.

W. Pearson, Q.C., and *J. T. Prior*, for the Defendants:—

It is possible that the Plaintiff may have some right of action against her trustees, but with that the Defendants have no concern, and, unless the Plaintiff can make out that the company have no title under their conveyance, they cannot succeed. Now the conveyance recites the will so as to shew the power of sale which it contained, and the trustees convey in exercise of the powers given to them by the Act "or otherwise," while by the terms of the will the power is exerciseable after the tenant for life is dead and the parties have become beneficially entitled, for not until then can any "division" be made. The trustees, therefore, could make a good title irrespective of the statute, and were competent to sell and convey to the company, unless both the *cestuis que trust* required them to convey the property to them as tenants in common. Assuming, however, that the trustees could not sell under the will, it is said that they cannot sell under the 7th section of the Act, because the married women are absolutely entitled for their separate use; but the married women who are empowered to sell are those who are "seised in their own right," which is a technical expression quite inapplicable to mere equitable interests like the present; and while there is no power for a *cestui que trust* to sell, trustees are expressly empowered by the section to sell on behalf of their *cestuis que trust* whether *femes covert* or other persons.

[HALL, V.C.:—I think these ladies proceeded on the footing that the trustees were the persons to deal with the property, provided they acted in conformity with the statute.]

Assuming, then, that the trustees had a power of sale under the statute, being trustees in fee simple, the 9th section does not apply to their case; nor need there be any valuation at all, for the section only applies where the parties selling are under disability or incapacity, and also without power to sell except under the Act, and those two requisites must concur; and if you admit that a married woman entitled for her separate use is not under disability the trustee for her can sell under the absolute power given by the 7th section without the qualifications introduced by the 9th section. If, however, the 9th section is applicable, all that it requires is that the price shall not be less than that fixed by two able practical surveyors, and if they sell at the price so determined, that is sufficient, for the Act does not require two steps to be taken, first a fixing of price and then a valuation. And there is now no question as to undervalue. Assuming, then, that the trustees had power to sell under the Act, there is no reason why, in the absence of any conflict of interest, they should not act under the provision in the will with regard to professional trustees, and appoint one of themselves as their surveyor. Mr. *Glasier* is an eminent surveyor, and his interest as a valuer was the same as his interest as a trustee, and as the interest of his co-trustee, who was the husband of one of the beneficiaries, viz., to get the best possible price for the property.

HALL, V.C.:—

I think that the Plaintiffs are substantially right in this action, although some consideration may be necessary as to the precise form of the judgment which ought, under the circumstances, to be delivered in the case. Taking the view that I do, it is perhaps not necessary for me to determine the several points argued by counsel; but, nevertheless, I intend to express my opinion upon all and each of them, because it may possibly be of use to the parties hereafter.

With reference to the first argument on the part of the Defendants, that the trustees could sell under the will without having recourse to the Act of Parliament, it appears to me that the difficulty involved in that contention was not sufficiently met. Of course an indefinite power of sale would be void: such a

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power cannot exist for ever, there must be a time when it will come to an end: and, when the power is given indefinitely, whether there are life estates, or estates tail, and limitations of the remainder, it is, I conceive, settled law that the power is valid during the life estate or during the estates tail, because while estates for life limit themselves the estates tail are destructible or can be barred, and therefore the power is supported, and that, notwithstanding that there might be a succession of minorities. That appears to be determined as regards ordinary powers of this kind, as distinguished from powers and provisions which would change the beneficial interest, as, for instance, provisions for accumulation, —it being of course understood that I am not now speaking with reference to the *Thellusson Act*. But when the limitation in remainder comes into possession, although no express limit may have been put upon the continuance of the power, yet there is an end of the power, because the property is then "at home," and, the party entitled in remainder becoming beneficially entitled, it is considered that the power is not to be kept up beyond that time. If it were so it would be exceedingly difficult to say when the power was to end. That principle was, I think, enunciated by Vice-Chancellor *Wood* in *Lantsbery* v. *Collier* (1), and has since been generally accepted, and there are several other authorities to the same effect, which are cited in *Sugden* on Powers. Mr. *Prior* has said that here the power must be exerciseable after the determination of the life estate, because it is exerciseable for the purposes of division, but that argument is sufficiently answered by this, that in certain events provided for by the will the trust might go on after the determination of the life estate. If the gift over in favour of the issue had taken effect (as it might have done), the operation of the trust to assign over immediately after the death of the tenant for life would have been interfered with as to one or both of the moieties, and then the provisions in favour of the issue might have necessitated advances of money to children who were minors which could apparently only be raised by the exercise of the power of sale, or at all events might be provided through the medium of that power. I think it will be found that the law, as I have stated it, is good law, and in accordance

(1) 3 K. & J. 709.

with the law as laid down and the authorities cited by Lord *St. Leonards* in his work on Powers. And I think, therefore, that the first argument may be taken as out of the question, to say nothing of this, that upon a fair consideration of all that has taken place here, and notwithstanding the words thrown in in the conveyance, I do not think that the parties were assuming to act in any way under the power in the will. There is nothing, so far as I can see, in the conveyance which points to that, and much that leads the other way. The words expressing that the conveyance is made under the statute "or otherwise," in my opinion merely refer to the power of transferring the property rather than to their having any power of making a title or selling or contracting "otherwise" than under the Act of Parliament. I may further observe while I am upon this part of the case, that if the trustees were selling under a power in the will, it is plain that they could not sell "at a price to be fixed by two able practical surveyors," a consideration which seems in itself to destroy the reliance placed upon the power in the will.

Then it is said that the sale is ineffectual under the provisions of the Act, because the 7th section of the Act is inapplicable to a case where the beneficiaries are married women who, either by reason of their being absolutely entitled or absolutely entitled for their separate use, are able themselves to sell, that in such cases their trustees cannot sell for them. With regard to married women being able themselves to sell, I should say that where the earlier part of the 7th section speaks of a "married woman seised," it does not provide for a case of this kind. No doubt a married woman entitled in fee for her separate use could herself act and negotiate and sell, but in the absence of her so doing, where a trustee for her who has the legal fee proceeds to act under this section, and does so without any interposition or objection by the *cestui que trust*, I think that in such a case the trustee would be a person competent to contract under the 7th section, and I think so notwithstanding the concluding words of the section, which point to persons who are not competent to contract, and empower trustees to convey, "on behalf of their *cestuis que trust*, whether infants, issue unborn, lunatics, *femes covert*, or other persons, and that to the same extent as such *cestuis que trust* respectively could

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have exercised the same powers under the authority of this and the special Act, if they had respectively been under no disability." If these married women are not persons who could exercise the powers of this Act and the special Act, which I am disposed to think they are not, as not being "seised," then there can be no question. If, however, they are persons who can exercise these powers, I do not think that the reference at the end of the section would be correctly construed to exclude the trustees, but that the effect of the section is to give power to trustees irrespective of the fact of there being also a power to the *femes covertes*, the *cestuis que trust*. I conceive that the section must be construed as giving powers to each, subject always to this, that if the *cestui que trust* is absolutely entitled in fee, and is known to object to the sale by the trustee, I apprehend that the person taking from the trustee under such circumstances would run a great risk of having his title called in question by the absolute beneficial owner; that a person buying from a trustee (although with the actual power to sell) knowing that the *cestui que trust* objected, and was able and willing to contract himself, and desirous so to do, would take the property at his peril. But, subject to that, I think that the trustee would in such a case have power to contract and make a title. In the present case the *cestui que trust* did not in fact object that the trustees were not the persons to deal with the company and sell, provided only that what the trustees did was with her sanction, and so I do not think that it is open to the Plaintiffs to complain on that ground. But what the *cestui que trust* did require was that the price should be fixed in the way which the Act of Parliament provides, and she objected to the particular sum for which the trustees proposed to sell. Under these circumstances the question comes to this,—has what the trustees have done been in accordance with the provisions of the Act of Parliament?

Now, assuming at this stage that they had power to sell, it appears to me that a very material and substantial objection is that they have not in reality affected to contract as trustees at all, nor to exercise a power to sell for a sum ascertained by themselves. What I think the Act of Parliament means is, that when trustees sell they shall negotiate the sale and get a price fixed by arrangement, and having done so, that the sufficiency of the price

is to be tested after it is fixed by the application of the 9th section. They are first to contract, and then, in order to protect the *cestui que trust*, they must ascertain, by having the valuation made, that the price is sufficient. It is argued that where the trustees who sell are not within the meaning of the Act persons who are under "disability or incapacity," and also "not having power to sell or convey such lands except under the provisions of this or the special Act," the 9th section is inapplicable, but I think it must be read in connection with sect. 7. We must read it in a reasonable way, and it appears to me that these words, and "not having power to sell and convey," &c., are not to be read, notwithstanding the disjunctive "disability or incapacity," as only applying to a case where there is one of the disabilities or incapacities pointed out in sect. 7.

That is the fair construction. In the case of incapacity to sell there is no power, because the Act of Parliament has not conferred any power to give receipts, and therefore the person under incapacity is not able to act at all except so far as he can sell by the aid of the 7th section; and the money must go into Court under the provisions of the 69th section.

On the whole it appears to me that the 9th section is applicable to the case, and I think I may say that such has been the practice in taking titles for railway companies, in cases where trustees were only acting under the powers of the Act of Parliament. It appears to me, therefore, that there has been a miscarriage by the trustees in not selling through the medium of a contract entered into; failing which, there are other provisions in the Act which come into operation: for instance, as to ascertaining the price by arbitration or by a jury. They must go through that process, failing an agreement. The way in which they have come to an agreement is a way in which they were not intended to proceed, for, as it appears to me, they have delegated their power by selling for a sum to be fixed by two able surveyors,—and that is what they were not authorized to do.

Assuming, however, that there is nothing in that objection, there is still the other question which has been discussed with regard to the appointment of one of themselves as one of the two able practical surveyors, and in my judgment it is clear that the

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9th section supposed that someone would be appointed other than one of the parties themselves. Suppose there had been only one trustee, that one trustee would be appointing himself as one of the two. It was manifestly the intention, in selecting the persons who were to check the value put on the property by the parties themselves, or agreed for by the parties themselves, that the sufficiency of the price should have the sanction of somebody else. If you appoint the man himself as one of the two to be appointed, you have not got the test which was contemplated and intended by the 9th section. It appears to me, therefore, that there has been a fatal error in the proceedings in that respect. That being so, I see nothing upon which the company can rest their title to this undivided moiety. They have got the conveyance of the fee in the entirety, and they have got that erroneously under erroneous proceedings; but as regards one of the beneficiaries entitled to an undivided moiety, that beneficiary has adopted the sale and acted upon it, and therefore cannot complain of it. Under these circumstances, it appears to me that such a judgment must be delivered as will not interfere with the railway company retaining possession as tenant in common with the other *cestui que trust*, or the trustees on her behalf. Therefore the judgment must be in substance a declaration that the company have not acquired a good title to the undivided moiety of the Plaintiff and her trustees, and that the Plaintiff or her trustees are entitled to hold and enjoy that undivided moiety in common with the railway company, and that the railway company must be restrained from in any way interfering with the enjoyment by the Plaintiff and her trustees as tenants in common of that undivided moiety. I do not see what more I can do. There will be liberty to apply, and the Plaintiff will have her costs of the action.

By consent no mandatory order was made on this occasion, but simply a declaration with liberty to apply.

Solicitors for Plaintiff: *Wyatt & Barraud.*
Solicitors for Defendants: *Cope & Co.*

DALRYMPLE *v.* HALL.

V.-C. H.
1881
Feb. 8.

Will—Construction—"Unmarried."

Property was given by will to trustees in trust for *A.* for life, "but if he should die unmarried," to be equally divided between the children of *B.* At the date of the will *A.* was a bachelor, and at the time of his death he was a widower:—

Held, that, in the absence of context shewing a contrary intention, the word "unmarried" must be construed according to its ordinary or primary meaning, as "never having been married," and therefore that the gift to the children of *B.* did not take effect.

WILLIAM ALLEN, who died in June, 1837, by his will, dated in February, 1837, gave all his freehold and leasehold estates to trustees upon trust from time to time to receive the rents and profits thereof, and to divide the same into six equal parts, and as to one equal sixth part thereof upon trust to pay the same to *Charles Green* during his life, "but if he should die unmarried" his share to be equally divided between the children of his brothers, but in case he should attempt to sell, mortgage, or otherwise incumber the same, then the testator directed that his share should be equally divided between his brothers, and as to the other sixth parts, upon the trusts therein contained; and the said testator gave the residue of his personal estate in manner therein mentioned.

At the date of the will *Charles Green* was a bachelor, but he subsequently married; and he died in 1871 a widower, and without having attempted to sell, mortgage, or otherwise incumber his share.

The present action was brought by the heir-at-law of the testator for a partition or sale, with a declaration as to the rights of the persons interested in the sixth share so given to *Charles Green* for life as aforesaid.

The only question now argued was as to the meaning of the word "unmarried."

W. Baker, for the Plaintiff, the heir-at-law of the testator:—

Unless there is any context to control it, and here there is

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none, the word "unmarried" must be taken to have been used by the testator in its primary sense as meaning "never having been married": *Clarke* v. *Colls* (1).

G. M. White, for the Defendants, the children of *Charles Green's* brothers:—

The meaning to be attributed to the word should be that which will be in accordance with the intention of the testator so far as it can be ascertained: *Lett* v. *Randall* (2). Here, if the meaning contended for by the Plaintiff should be adopted, there would be an intestacy, and accordingly the word (the meaning of which is flexible) should be construed as "without leaving a widow," by which construction an intestacy would be avoided: *In re Sanders' Trusts* (3); *Day* v. *Barnard* (4); and, as pointed out by Mr. Justice *Bayley* in *Doe* v. *Rawling* (5), the word is used in this sense, *i.e.*, as "not married at the time," in the *Poor Law Act* of 3 Wm. & M. c. 11.

Russell Roberts, as *amicus curiæ*, referred to *Emmins* v. *Bradford* (6).

HALL, V.C.:—

This will contains a gift of a life interest, but no disposition of the *corpus* of the share except in a specified event, and I have to ascertain what that event is, for which purpose I must decide what is meant by the word "unmarried."

If it means "not married at death," there would in a certain event be no complete disposition of the share. It is true that in the particular event which has happened the share would be disposed of upon that interpretation, while if it meant "not married at any time" it would not. But this will being manifestly imperfect, and not making a complete disposition in all events, I must construe the word "unmarried" according to its ordinary meaning. It is said that the ordinary meaning is "without ever having been married." If that is so, I must adopt it;

(1) 9 H. L. C. 601, 618.
(2) 10 Sim. 112.
(3) Law Rep. 1 Eq. 675, 683.
(4) 1 Dr. & Sm. 351.
(5) 2 B. & A. 441.
(6) 13 Ch. D. 493.

and, having regard to what has been said upon the subject in the authorities, I must take it to be so.

There is in this will no context. This is not one of the cases where there is a gift over on death intestate and unmarried, and those cases have no application to this will, for they are generally cases which have reference to a particular marriage, and ordinarily to procreation of issue. This is a case without any context to indicate the meaning of the word "unmarried," and I must, therefore, attribute to it its ordinary meaning, namely, "without ever having been married."

Solicitors: *Tippetts & Son.*

FRY, J.
1881
Feb. 23.

HOLT & CO. *v.* COLLYER.

[1880 H. 133.]

Injunction—Covenant—"Beerhouse"—Construction—Technical Meaning—Evidence.

19 Ch D 261

A person who had entered into a covenant not to use a house as a public-house, tavern, or beerhouse, opened a grocer's shop there, at which he carried on the sale of beer to be drunk off the premises as an ancillary business to his grocer's business :—

Held, that this was no infringement of the covenant.

Evidence to shew that the word "beerhouse" was understood in the trade in a technical sense rejected.

THE Defendant was lessee of a shop in *Bromley*, in *Middlesex*, and he had entered into a covenant, to the benefit of which the Plaintiffs were entitled, not to use the same as "a public-house, tavern, or beerhouse."

It was admitted by the Defendant that he had opened the shop as a grocer's shop, and had taken out a license to sell beer there by retail, not to be drunk on the premises.

The question for trial was whether such a use of the shop was a breach of the covenant.

Mr. Justice *Fry* refused to admit evidence as to any technical meaning which the word "beerhouse" might have acquired in the brewing trade, for the reasons given in his judgment.

Cookson, Q.C., *Oswald*, and *Radcliff*, for the Plaintiffs :—

The word "beerhouse," no less than "beershop," is a general word, and includes all places where beer is sold, even though it is to be drunk off the premises. *Johnson's* Dictionary, tit. Beerhouse ; *Burn's* Justice of the Peace, tit. Beerhouse ; Statute 6 Geo. 4, c. 81, 11 Geo. 4 & 1 Will. 4, c. 64, ss. 1, 2 ; 26 & 27 Vict. c. 33, s. 1. We ought to be allowed to produce evidence to prove that the word "beerhouse" has a technical meaning in the trade : *Taylor* on Evidence (1). In the Wine and Beerhouse Acts of 1869 and 1870 (32 & 33 Vict. c. 27, and 33 & 34 Vict. c. 29)

(1) Vol. ii. p. 968, s. 1161.

the word is used in a wide sense. In the cases of the *London and North Western Railway Company* v. *Garnett* (1), *Jones* v. *Bone* (2), *Bishop of St. Albans* v. *Battersby* (3), and *London and Suburban Land and Building Company* v. *Field* (4), the meaning of "beershop" was considered, but the word "beerhouse" was only the subject of *obiter dicta*.

Everitt, for the Defendant *Glaskin*, an intermediate tenant, and

Millar, Q.C., and *Thomson*, for the Defendant *Collyer*, were not called on.

FRY, J.:—

On the 8th of August, 1879, the Defendant *Glaskin* granted a lease to the Defendant *Collyer* of a certain piece of ground situate at *Bromley*, and by that instrument the Defendant *Collyer* covenanted with *Glaskin* that he would not carry on, or permit to be carried on, "on the premises hereby demised or any part thereof the trade or business of a soap maker or boiler, tobacco-pipe maker or burner" (and various other trades there enumerated), "or any dangerous, noisy, noisome, or offensive business whatsoever, or use or permit the said premises to be used as a public-house, tavern, or beerhouse." It appears that upon this plot of ground a house has been erected, and the Defendant *Collyer* admits that he has used, and is now using, this house for the purpose of selling beer to be consumed off the premises, but save as aforesaid he denies that he is using or permitting the same premises to be used as a public-house, tavern, or beerhouse, or otherwise in an unlawful manner, or contrary to the provisions of the covenants contained in the lease, for he says that his business is mainly that of a grocer, the business of selling beer being merely ancillary to the grocery business, and having been commenced subsequently thereto. Now no evidence has been tendered to shew that that statement is not perfectly correct; and that being the statement of the Defendant, which to a large extent has been admitted by the Plaintiffs for the purposes of this action, I am bound to consider

(1) Law Rep. 9 Eq. 26.
(2) Ibid. 674.
(3) 3 Q. B. D. 359.
(4) *Ante*, p. 645.

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that that at any rate may be taken to be a true description of the business carried on by the Defendant. Now, that being so, two questions require my adjudication. The first is with regard to the principle upon which I am to determine the meaning of the word "beerhouse." The Plaintiff's counsel have pressed upon me that I ought to admit evidence shewing the meaning of the word "beerhouse," as understood in the trade. I have rejected that evidence, and I have rejected it for two reasons. In the first place, when that evidence was suggested by Mr. *Cookson*, I called his attention to this, that I did not feel inclined to admit it unless he could shew me that the word has not here its primary and popular signification, and that the word was here to be taken as used, not in its primary and popular signification, but in some secondary and technical sense; and he then said he should be quite content with the opportunity of meeting any evidence of its technical meaning by way of rebutting evidence if I would give him such an opportunity, and having done so, he did not press his evidence, but accepted that proposal. But he afterwards resiled from that, and I held him to the course which he had previously deliberately adopted, and for this reason, that I am bound in the interest of suitors to see that cases are conducted in a manner which does not unreasonably take up the time of the Court.

But independently of that observation, which applies only to this particular case, I rejected the evidence upon a broader and more general ground. In my view the principle upon which words are to be construed in instruments is very plain—where there is a popular and common word used in an instrument, that word must be construed *primâ facie* in its popular and common sense. If it is a word of a technical or legal character it must be construed according to its technical or legal meaning. If it is a word which is of a technical and scientific character, then it must be construed according to that which is its primary meaning, namely, its technical and scientific meaning. But before you can give evidence of the secondary meaning of a word, you must satisfy the Court from the instrument itself or from the circumstances of the case that the word ought to be construed, not in its popular or primary signification, but according to its secondary intention.

Now is there anything here from which I can infer that the

word "beerhouse" was not used in its primary and popular sense? The covenant which the Plaintiff desires to have enforced against the Defendant is contained in an indenture of lease, which is not a trade instrument in any sense of the term. It is an ordinary lease by a landlord, who is not shewn to be a brewer or connected with the brewing trade, to a person who was not, according to the Plaintiff's own statement, connected with the business of selling beer at that time, and in respect of whom there is no evidence to shew that he was engaged in any way in the business.

If there be, therefore, a technical signification to that word in the brewing trade or in the beer trade, there is no reason to suppose that the parties so used it in this instance, and to admit evidence now to that effect would be, in my opinion, contrary to the ordinary course and practice of the Court. I accordingly rejected the evidence, and I therefore proceed to consider the meaning of the word "beerhouse" according to what I will call its ordinary signification, not neglecting the use of dictionaries or any other means of information which may assist me in coming to a conclusion as to what is the ordinary meaning of the word. In coming to a conclusion as to what is the ordinary meaning of the word, I am greatly assisted by the decisions of two Courts of co-ordinate jurisdiction with this; one of them is the decision of Vice-Chancellor *James* in *Jones* v. *Bone* (1), in which he held that a shop used as this is was not a beerhouse. The other is the decision of the late Lord Chief Justice *Cockburn* and Mr. Justice *Mellor*, both of them very eminent Judges, sitting in the Court of Queen's Bench, in the case of the *Bishop of St. Albans* v. *Battersby* (2). The decision there no doubt turned upon the word "beershop," but their Lordships expressed their understanding of the meaning of the word "beerhouse" in a manner which seems to me not to be mistaken, and in respect of which Mr. *Cookson* very fairly said that their intention was apparent from the judgment. They drew the distinction between the words "beerhouse" and "beershop," and said that whereas beerhouse means a place where beer is sold to be consumed on the premises, a beershop is a place where beer is sold to be consumed off the premises. Well, then there is the more recent decision of the Court of Appeal in the case of the

(1) Law Rep. 9 Eq. 674. (2) 3 Q. B. D. 359.

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London and Suburban Land Company v. *Field* (1), in which Lord Justice *James* reiterated the expression of opinion which he had given when Vice-Chancellor, and said that the word "shop" was perpetually introduced into leases because the word beerhouse has obtained a technical meaning and must be so taken, and the other two learned Judges of the Court did not at any rate express any difference of opinion from him.

That being the state of the authorities, I should feel myself bound by them in this sense, that unless I had a very strong and clear opinion that the decision of Vice-Chancellor *James* and the decision of the Court of Queen's Bench were wrong, I should think it a lesser evil to follow them than to give expression to a doubt leading to an opposite opinion in my own mind; and for this reason, that it is important to the public that the meaning of the word "beerhouse" should be ascertained once for all, because then persons who have to draw instruments relating to businesses of this sort will know on what principle to proceed, and counsel who are called upon to advise whether there is or is not a case to proceed upon at law will know how to advise. But independently of the weight of authority, I should have come to the same conclusion as that expressed in those cases. I put this question to myself, Should I, in ordinary usage and ordinary parlance, call a grocer's shop at which beer is sold, either by wholesale or by retail, a beerhouse, when the principal business carried on in that shop is that of a grocer, and when the business of the sale of beer is merely ancillary to that business of a grocer: and I answer that I should not myself do so. For those reasons it appears to me that the Plaintiffs fail.

I ought perhaps to add that I think an inference in the same direction may be drawn from the collocation of words in the covenant itself, because when I find that the word "beerhouse" follows "public-house or tavern," I am rather led to infer that it is a house *ejusdem generis*, that is to say, a house where some alcoholic liquor is consumed on the premises. I think, therefore, that the application of the Plaintiffs in the present instance fails, and I accordingly dismiss the action with costs.

Solicitors: *G. J. Nutt & Savery; H., J., & T. Child.*

(1) *Ante*, p. 645.

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[1879 F. 117.]

FRY, J.
1881
Feb. 26.

Tenant for Life and Remainderman—Leaseholds—Repairs—Trustee—Receiver.

When leasehold houses are vested in trustees on behalf of a tenant for life and remaindermen, it is the duty of the trustees to keep the property free from the risk of forfeiture by a breach of the covenants of the lease, and they are entitled to have the rents applied in keeping the houses in a proper state of repair.

The trustees are not bound to be content with the setting apart of a sum of money in the joint names of themselves and the tenant for life as an indemnity against the consequences of a breach of the covenants of the lease, but are entitled to require the covenants to be specifically performed.

When a tenant for life of leasehold houses is allowed by the trustees to receive the rents, and the houses are not kept in a proper state of repair according to the covenants of the lease, the Court will, at the instance of one of the trustees, appoint a receiver of the rents, for the purpose of enforcing the proper repair of the houses.

T. M. FOWLER, by his will, dated the 31st of March, 1876, appointed the Plaintiff, the Defendant *Alice Odell* (the wife of the Defendant *R. F. Odell*), and the Defendant *Samuel Odell*, executors and trustees of his will. And the testator thereby (*inter alia*) bequeathed four leasehold houses to his trustees, upon trust to receive the rents and profits arising therefrom and to pay the same into the proper hands of the Defendant *Alice Odell* during her life, but so that she should have no power of anticipating the same; and he directed that her receipt alone from time to time should be a sufficient discharge for the same; and from and after her death he directed his trustees to stand possessed of the houses in trust for *T. M. Odell* and *P. F. Odell*, the children of the Defendants *R. F. Odell* and *Alice Odell*, and the survivor of them, as and when he or they should attain the age of twenty-one, share and share alike as tenants in common. The testator died on the 10th of December, 1876. The action was commenced on the 20th of June, 1879. By his statement of

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claim, the Plaintiff alleged that the Defendants *R. F. Odell* and *Alice Odell* had, as from the death of the testator, been in direct receipt of the rents and profits of the leasehold houses, but since the death of the testator they had not properly repaired or maintained the same, and the same respectively had fallen into and were in disrepair. The Plaintiff alleged that the Defendants *R. F. Odell* and his wife refused to make any provision out of the rents and profits of the premises for the repair thereof, and that the Defendant *Samuel Odell* declined to call on them to do so. The two children of the Defendants *R. F. Odell* and his wife were infants. The Plaintiff claimed to have the trusts of the will remaining unperformed carried into execution by the Court, and proper provision made for executing all necessary and proper repairs to the houses, and meeting any claim which might be made for dilapidations in respect thereof, and proper directions given as to raising any money which might be required for such purposes, and, if proper, the appointment of a receiver of the rents and profits of the houses.

Previously to April, 1878, the rents had been collected weekly by the solicitors to the executors, and paid into a bank to the account of the executors.

In April, 1878, Mrs. *Odell* was allowed by the trustees to go into receipt of the rents, the Plaintiff telling her to go on receiving the rents "at all events for the present."

The evidence shewed that the houses were not in a proper state of repair. Before the commencement of the action the Defendants had offered to indemnify the trustees against liability on the covenants in the leases, by investing for that purpose a sufficient sum of money in the joint names of the Plaintiff and Defendants.

North, Q.C., and *W. Barber*, for the Plaintiff:—

If the houses are allowed to be out of repair the landlord may forfeit the lease and deprive the infant children of their interest. It is the duty of the trustees to prevent this, and they are entitled to have the rents applied in doing the necessary repairs.

Millar, Q.C., and *Methold*, for the Defendants:—

Is the Plaintiff entitled to a receiver in perpetuity? This

would be contrary to the testator's intention. His will means that either the tenant for life or the trustees are to be in possession or receipt of the rents. No house can ever be in a state of perfect repair; fresh repairs are required from week to week. The Plaintiff ought to have applied to his *cestui que trust* to do the repairs. At any rate, a systematic want of repair ought to be proved. The evidence shews only a trifling want of repair. The offer of an indemnity which we made was sufficient, and the Defendants ought not to have been put to the expense of an action.

FRY, J., after stating the facts, and observing that on the evidence he came to the conclusion that the covenants in the leases had not been fairly performed, continued:—

Is it or is it not the duty of trustees of leasehold property to keep it free from the risk of forfeiture? In my opinion it is their duty so to keep it in the interest of the remaindermen. If so, out of what fund are they to perform that duty? It can only be out of the rents of the property, for there is no other fund applicable. I think, therefore, that the Plaintiff has a right to have the covenants in the leases performed out of the rents of the houses, and I must appoint a receiver of the rents for that purpose. It is said that the action is a frivolous one, but I do not take that view of the evidence. Then it is said that before the action was brought the Defendants offered the Plaintiff everything which he was entitled to. They offered, in substance, to give the trustees an indemnity against any risk to which they might be exposed from a breach of their duty. In my view, the offer was simply an offer of indemnity against loss by reason of the covenants not being specifically performed, and a trustee is not bound to be satisfied with such an offer as that. He is entitled to have the covenants specifically performed. Then it is said that the Plaintiff allowed Mrs. *Odell* to go into receipt of the rents, and that he ought to have seen that the houses were in a proper state of repair. The evidence, however, shews that he allowed Mrs. *Odell* to go into receipt of the rents only as a temporary measure. I am of opinion that the Plaintiff is entitled to require the covenants in the leases to be performed by means of the rents, and I shall make

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FOWLER *v.* ODELL.

a declaration to that effect. And in order to give effect to that declaration I shall appoint a receiver of the rents.

MINUTE OF ORDER:—Declare that the trusts of the will in relation to the houses ought to be carried into execution by the Court, and that the Plaintiff is entitled to have a receiver of the rents appointed. The Plaintiff's costs of the action to be a charge on the houses. No order as to the costs of the Defendants.

Solicitor for Plaintiff: *D. E. Langham*, agent for *Langham & Son, Uckfield.*

Solicitors for Defendants: *Rixons.*

FRY, J.
1881
March 5.

SMITH *v.* DAY.

[1879 S. 482.]

Taxation of Costs—"Affidavit of Increase."

Upon summons to review the taxation of costs, the Court refused to direct the Taxing Master to adopt the practice in the Queen's Bench Division of requiring the solicitor to make an "affidavit of increase," since evidence could be obtained without such affidavit of all matters necessary for the information of the Taxing Master. But the Court declined to lay down any rule that such affidavit of increase should in no case be required.

THIS was an adjourned summons taken out by the Defendant for review of the taxation of the Plaintiffs' costs of action.

The action was brought for an injunction to restrain the Defendant from building in such a manner as to interfere with the free access of light and air to the Plaintiffs' stable. The action came on for trial in November, 1880, when witnesses were called on both sides, and after four days' trial the Court decided that the Plaintiffs had made out their right to the free access of air but not of light, but although his Lordship decided that the Plaintiffs had failed in establishing their right to light, he ordered the Defendant to pay the whole of the Plaintiffs' costs of the action.

The Plaintiffs' costs had been taxed by the Master, and after certain items had been struck out upon several objections raised on behalf of the Defendant, he certified the amount at the sum of £515 18*s.* 9*d.*: other objections raised by the Defendant were

disallowed. The ground of the present objection to the Taxing Master's certificate was that he had refused to require from the Plaintiffs' solicitor an "affidavit of increase," proving the payment of fees to counsel, the number of days the cause was in the paper, the names and descriptions of the witnesses, the distances of their residences from the place of trial, and the number of days they were absent from home; that all the witnesses were material and necessary to the case of the party whose costs were being taxed, and the several sums paid to them for conduct money, loss of time, and expenses.

Maidlow, for the Defendant, in support of the summons:—

What we now ask the Court to decide is that the Plaintiffs' solicitor should make an "affidavit of increase," in accordance with the practice which prevails in the Queen's Bench Division. The "affidavit of increase" is required to prove all the different payments included in the bill of costs, and is a most useful and necessary check upon expenditure; and now that the practice of examining witnesses has been introduced into the Chancery Division, the practice adopted in the Queen's Bench Division for proving the amount of costs by means of an "affidavit of increase" should be applied to the taxation of costs in the Chancery Division. By the 28th rule of August, 1875, it is provided that the practice of any Court whose jurisdiction is transferred to the High Court, relating to taxation of costs, shall be applicable to costs of the same or analogous proceedings in all the Courts.

The examination of witnesses has introduced so great a change in the practice of this Division, and the practice has now become so much assimilated to the form of the Common Law procedure, that the Common Law mode of taxing costs ought to be followed, since it is much more convenient than the mode adopted in the Chancery Division.

In the case of *Newbiggin-by-the-Sea Gas Company* v. *Armstrong* (1), it was decided by the Court of Appeal that where no rule of practice is laid down by the new Orders, and there is a variance between the old practice of the Chancery and Common Law Courts, that practice is to prevail which is considered by the

(1) 13 Ch. D. 310.

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Court to be most convenient. The rule that the practice in the Chancery Division should be assimilated to that of the Common Law Divisions in regard to refreshers, was laid down in *Harrison* v. *Wearing* (1).

In this case the costs of the witnesses amounted to £100 out of the £515, and it is very important that we should have an affidavit shewing that this sum was properly expended: *Gray's* Law of Costs (2).

North, Q.C., and *Vernon Smith*, for the Plaintiffs.

FRY, J.:—

The Defendant in this case objects to the entire taxation of the Taxing Master, upon the ground that the counsel's fees and payments to witnesses have been allowed, without any evidence being before the Taxing Master (except receipts) that any of the payments in question have been made, or that the witnesses were material, or how many days they were in attendance, or what were the sums paid to them. He states that in the Common Law Divisions the Taxing Master never taxes a bill without an affidavit of increase proving that the payments to the witnesses have been made, and the Defendant contends that he has a right to insist upon such evidence in this case.

It appears from the statement of Mr. *Maidlow*, and I have no doubt it is accurate, that the Common Law practice is as thus stated; and it also appears that in some cases in this Division the Taxing Master does direct an affidavit of increase to be filed. Mr. *Maidlow* contends that in cases not provided for by the Rules, the Courts are to choose between the Common Law and Chancery practices, and to take the better: a proposition in which I entirely agree. He then says that in this case the Common Law procedure is the better, and therefore the Court is bound to follow it. Is the Common Law procedure the better? I am not convinced that it is, having regard to the form of judgment which is in practice in this Division. At Common Law, if I am not mistaken, the judgment gives no information as to the number of days on which the case was tried before a jury or a Judge, and it

(1) 11 Ch. D. 206. (2) Page 496.

gives no information as to the names of the witnesses or the other evidence produced at the trial, and the Taxing Master, therefore, not unnaturally requires evidence to satisfy him of these facts; but in the form of judgment which prevails in this Division that information is given to him by the judgment itself; and further than that, I cannot help observing that the Taxing Master, being an officer of the Court, has the means, by communication with the other officers of the Court, of clearing up any difficulty, if such arise in the course of the taxation, as to what really took place at the trial.

It appears to me that to require this affidavit in all cases where the Master has satisfied himself that the payments were actually made, that the witnesses actually attended, and that they were material, is not desirable. It is only adding another ground of expense to the numerous sources of costs which already exist. Mr. *Maidlow* suggests that his client will have to pay the costs of this affidavit, which probably may be true. But the persons who actually direct that a step be taken are very often persons who will benefit by the step, whether it be successful or no; whereas the person who has to pay for the step is a person who has no benefit resulting from the step, whether it is taken or not: and that is one great source of costs. In this Court I have no intention of increasing the costs of taxation by requiring an affidavit of increase in all cases. At the same time I am not laying down any rule that, in any case in which the Taxing Master thinks it reasonable to require it, an affidavit of increase should not be made. I leave it to his discretion.

Now, what took place on this occasion? The Taxing Master, in his certificate, says: "In the Chancery Division it is the practice of the Master to satisfy himself that the counsel's fees have been paid, and that the witnesses were material, and that they attended in Court on the days for which payments are claimed, and that all payments claimed have been duly made. I have in this case satisfied myself on all these points by proper evidence, and I see no reason for departing from the practice by requiring what is known as an affidavit of increase. None of these objections were made or suggested to me on the occasion of the taxation of the Plaintiffs' bill of costs."

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The Defendant, therefore, when before the Taxing Master, did not ask for an affidavit of increase, and it is only after the Taxing Master has drawn up his certificate that he requires it. I have asked the learned counsel who has appeared for the applicant whether he can shew me a single payment which has been allowed which has not been made, a single witness who has been allowed for who is not material, or a charge for a single day on which the witnesses did not attend, and he candidly admits that he can do nothing of the sort. The simple result, therefore, if I were to accede to this application, would be to increase the expense Mr. *Maidlow's* client has to pay by an affidavit of increase, which would give him no more information than he had before. I think this application entirely unfounded, and I refuse the same with costs.

Solicitor for Plaintiffs: *R. H. Ward.*
Solicitors for Defendant: *F. & T. Smith & Sons.*

FRY, J.
1881
Feb. 22.

VIVIAN *v.* MOAT.

[1878 V. 54.]

Ejectment—Notice to Quit—Disclaimer of Plaintiffs' Title—"Customary Rent."

In an action of ejectment it was proved that the Plaintiffs, who claimed to be landlords of certain tenements, had given notice to the Defendants, as their tenants, that the rent of the tenements would be raised, and that the Defendants had thereupon written a letter stating that they "disputed the Plaintiffs' alleged right to raise the rent, but were willing and offered to pay what was due in respect of the customary rent of 11*s.* a year, being all that they were liable to pay in respect of the property":—

Held, that this letter was a repudiation of the relation of landlord and tenant and an assertion of a right to hold the tenements upon payment of a customary rent in the sense of a quit rent, and that the Plaintiffs were entitled to eject, upon proving their title, without proving a valid notice to quit.

THIS was an ejectment action, and the question arose whether the Defendants had denied the Plaintiffs' title as landlord, and, if they had done so, whether by such denial they lost their right to a proper notice to quit.

The action was brought by the trustees of the will of the late Earl of *Cardigan* for the recovery of the possession of two houses, called *Oak House* and *Oak Cottage*, which were built on the Earl of *Cardigan's* estate, *Headingly*, near *Leeds*.

For many years prior to 1866 the tenements had been held by the predecessors in title of the Defendants at rents which, although they had been uniform for long periods together, were proved by the evidence in the case to have varied from time to time.

Since 1866 no rent had been paid by the Defendants or their predecessors in title in respect of the tenements.

In 1866 the agents for the Plaintiffs' predecessor in title, the then Lord *Cardigan*, addressed a circular letter which contained the following notice: "We are instructed to revise the rents of the small holdings on this estate, and before sending in our report we shall be glad to have an interview with you respecting the premises at *Headingly* held by you as tenant under his lordship." Correspondence went on between the parties from the date of this letter down to 1876, the Defendants questioning the right of the Plaintiff to raise the rents, which they asserted were fixed rents in the nature of quit rents, or customary rents.

In the year 1876 *John Waddington*, the tenant of one of the tenements, having recently died, notice of the intended distribution of his estate was given to the Plaintiffs' agents, and they made a considerable claim against his estate in respect of the increased rent. Under these circumstances the Defendants, by their agents, wrote to the agents of the Plaintiffs on the 11th of March, 1876, as follows: "We beg to inform you that the trustees of the will of *John Waddington* dispute the late lord's alleged right to raise the rent, but they are ready and hereby offer to pay what is due in respect of the customary rent of 11*s.* a year, being, as they are advised, all that they are liable to pay in respect of the property, and unless some steps are taken within one calendar month for the purpose of substantiating the claim made by or on behalf of the late Earl or his representatives, the trustees of the will of *John Waddington* will act upon the notice contained in their letter of January last, and pay over the money and rents now in their hands to the parties entitled thereto."

The Plaintiffs thereupon gave the Defendants notice to quit

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the tenements, but such notice, owing to a clerical error therein, was objected to as insufficient.

This action was now brought for recovery of possession of the tenements.

Cookson, Q.C., and *Cozens-Hardy*, for the Defendants, raised the preliminary objection that it was not shewn that any valid notice to quit had been given.

North, Q.C., and *Stallard*, for the Plaintiffs:—

Such notice was not necessary for the purpose of ejectment, inasmuch as the Defendants had by the letter of the 11th of March, 1866, repudiated the Plaintiffs' title. The Defendants having denied the Plaintiffs' title, it would be absurd to require a notice to quit, which the Defendants would repudiate. The authorities say that a disclaimer by a tenant from year to year of the title of his landlord operates as a waiver by the tenant of the notice to quit, and, in fact, determines the tenancy at the election of the landlord: *Woodfall* on Landlord and Tenant (1). There can be no necessity to end that which the tenant says has no existence: the law on this point appears to be founded on the doctrine of estoppel. The action becomes one against a trespasser, and the Plaintiff has only to prove his title and need not prove a notice to quit: *Doe* v. *Grubb* (2); *Doe* v. *Frowd* (3); *Doe* v. *Evans* (4); *Doe* v. *Rollings* (5); *Hunt* v. *Allgood* (6); *Jones* v. *Mills* (7).

Cookson, Q.C., and *Cozens-Hardy*, for the Defendants:—

A disclaimer must be a setting up a title in another than the landlord, which was not done here: *Doe* v. *Cooper* (8), cited in *Hunt* v. *Allgood*; *Doe* v. *Stanion* (9). "Customary rent" in the letter of the 11th of March, 1876, meant the accustomed rent, and we were willing to pay this, and only denied the landlord's right to raise it during the existence of the tenancy. In *Doe* v. *Grubb* the disclaimer was admitted, and the only question

(1) 11th Ed. p. 325, ch. viii. s. 9.
(2) 10 B. & C. 816.
(3) 4 Bing. 557, 560.
(4) 9 M. & W. 48.
(5) 4 C. B. 188.
(6) 10 C. B. (N.S.) 253.
(7) Ibid. 788.
(8) 1 Man. & G. 135.
(9) 1 M. & W. 695.

was whether it related back. *Jones* v. *Mills* (1) is in our favour. But we are willing, at any rate, now to admit that there was a tenancy from year to year, and in that case notice would clearly be necessary before the Plaintiffs could recover in ejectment.

FRY, J.:—

The question in the case before me now is a very short one, namely, whether or no the Defendants have so disclaimed or repudiated the title of the Plaintiffs as landlords of the property as to enable the Plaintiffs to maintain this action, which was in substance an ejectment, without having given a valid notice to quit.

In my judgment, the letter of March, 1876, is an assertion, not that the lord had not rightfully and successfully raised the rent, but that he had not a right to raise the rent. Now, every landlord, in the ordinary sense of the word, has in popular language a right to raise the rent; that is to say, he may say to his tenant, "You shall either leave the land or pay an increased rent." It has been ingeniously argued, by Mr. *Cozens-Hardy* especially, that the meaning of this letter was that the writers only disputed the rightful raising of the rent in the past, and only said that the late lord had not successfully raised the rent; but that is not the language of the letter. It is in effect this: "We dispute the lord's alleged right to raise the rent, and do it as regularly as he will, and in what manner he will, he has no right to do it, and he cannot do it." That must be coupled with the assertion they make, that the rent is a customary rent.

Now, what is a customary rent? I understand that a customary rent means this: a rent which entitles the occupier to hold, so long as he pays. There is therefore the suggestion that the late lord, and therefore the present Plaintiffs, were not ordinary landlords of this estate, but were either lords of the manor or owners of some other right which gave them a title to a customary rent, which they could demand, and nothing more than that. Is that a sufficient renunciation within the principles which have been established in these cases? In my judgment it is. I will refer to the language used by Mr. Baron *Parke* in the case of *Doe* v. *Stanion* (2). He says there: "In order to make a verbal or written disclaimer sufficient, it must amount to a direct repu-

(1) 10 C. B. (N.S.) 788. (2) 1 M. & W. 695, 703.

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diation of the relation of landlord and tenant; or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it."

Applying that principle to the present case, I ask myself whether that letter does not come within it. It appears to me that it is a distinct repudiation of the relation of landlord and tenant as ordinarily understood, and an assertion of a right to hold the property upon payment of a customary rent, which is inconsistent with that relation.

One other observation must be made. In the case of *Doe* v. *Frowd* (1) Chief Justice *Best* suggested and laid down that notice to quit is only requisite where a tenancy is admitted on both sides. If that be the sound view of the law, it is quite clear that in this case no notice to quit was requisite, because the existence of the tenancy was not admitted until this morning.

On these grounds, then, I hold that there was that renunciation or disclaimer of the landlord's title which precluded the necessity of proving a valid notice to quit; and therefore that the objection upon which the Defendants' case now solely rests fails, and the result will be that there must be judgment for possession with costs.

Solicitors for Plaintiffs: *Duncan, Warren, & Gardner.*
Solicitors for Defendants: *Rooke & Son.*

FRY, J.
1881
March 8.

HASTINGS *v.* HURLEY.

[1880 H. 3922.]

Practice—Extension of Time—Indorsement on Writ of Date of Service—Rules of Court, 1875, *Order* IX., *r.* 13; *Order* LVII., *r.* 6.

Under rule 6 of Order LVII. of Rules of Court, 1875, the Court has power to extend the time fixed by rule 13 of Order IX. for the making an indorsement on a writ of the date of service.

THE writ in this action (a foreclosure one) was issued on the 2nd of December, 1880. On the 4th of December, 1880, an order

(1) 4 Bing. 557, 560.

was made by Vice-Chancellor *Malins* at Chambers, on the application of the Plaintiffs, giving the Plaintiffs liberty to serve the writ, together with a copy of the order, on *C. W. Hurley*, one of the Defendants, who was a British subject, at *Galveston*, in *Texas*, or elsewhere in the *United States of America*. There was evidence that he was then residing in the *United States*. The original writ, with a copy for service, was sent out to the British Consul at *Galveston*, and he on the 10th of February, 1881, served the writ on the Defendant, but he omitted to make the indorsement on the writ of the day of service, which is required by rule 13 of Order IX. to be made by the person serving the writ "within three days at most after such service."

Vernon R. Smith, for the Plaintiffs, now asked that the time for making the indorsement might be extended: Rules of Court, 1875, Order LVII., rule 6.

FRY, J.:—

I think I have power, under rule 6 of Order LVII., to extend the time for making the indorsement. I will extend it for a month from to-day. But the consul must make a fresh affidavit of service.

Solicitors for Plaintiff: *Peacock & Goddard*, agents for *Brydges & Mellersh, Cheltenham.*

END OF VOL. XVI.

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ADMINISTRATOR—*Breach of Trust—Notice.*] *A.*, *B.*, and *C.*, as the only next of kin with *D.*, the administrator, of their intestate father, signed a memorandum in 1872 authorizing *D.* to borrow, upon mortgage or otherwise as he might deem best, upon the security of certain house property, held by the intestate under an agreement for a lease to be granted on completion of repairs, such money as *D.* required for carrying out these matters, and to charge their respective shares with the interest.—A lease of the houses was soon afterwards granted to *D.* as the sole legal personal representative of the intestate, which, with the memorandum, was shortly afterwards deposited by *D.* as a security for his own debt with *E.*—In 1875 the administration accounts, shewing a balance due to *D.*, were settled between *A.*, *B.*, *C.*, and *D.*, and *D.* then told *A.*, *B.*, and *C.* that he had not borrowed any money upon the security of their shares under the memorandum of 1872.—In 1877 *D.*, who had previously mortgaged his

ADMINISTRATOR—*continued.*

share of the house property to *E.*, executed a further mortgage to him of the entirety, reciting the authority of 1872. No notice was given by *E.* to *A.*, *B.*, and *C.*, that he held any charge upon their shares under the memorandum:—*Held*, that, in the absence of any notice by *E.* to *A.*, *B.*, and *C.*, of a charge to him of their shares by *D.* under the authority of 1872, the mortgage of 1877, after that authority had been withdrawn by the settlement of accounts, did not affect their shares, and that they were entitled to an assignment from *E.* of their shares of the property comprised in the lease, which had been mortgaged by *D.* JONES *v.* STÖHWASSER - - - - - 577

2. —— *Durante minore ætate—Power to sell.*] An administrator *durante minore ætate* has, for the time, all the powers of an ordinary administrator, including a power to sell the estate of the deceased for payment of debts. *In re* COPE. COPE *v.* COPE - - - - - 49

3. —— *Foreign Assets—Assets received Abroad—Title of Administrator—Domicil.*] The legal personal representative constituted by the forum of domicil of a deceased person is entitled to receive the personal estate of the deceased got in through any letters of administration wherever they may be, and the next of kin cannot make any claim against the estate except through the intervention of such legal personal representative.—*Dicta* of Lord *Westbury* in *Enohin* v. *Wylie* (10 H. L. C. 1) followed. EAMES *v.* HACON 407

4. —— *Underlease with Option of Purchase—Breach of Trust.*] In dealing with the leaseholds of a testator or intestate, an executor or administrator may grant an underlease, if necessary for the due administration of the property, but cannot give an option of purchase at a future time.—An administrator granted an underlease of a leasehold estate of his intestate, with an option of purchase to the underlessee within seven years at a fixed price:—*Held* (affirming the decree of the

ADMINISTRATOR—*continued.*

Vice-Chancellor of the *Lancaster* Court), that the option of purchase was *ultrà vires*, and could not be supported against the next of kin, although it appeared from the evidence to be advantageous to the estate. OCEANIC STEAM NAVIGATION COMPANY *v.* SUTHERBERRY - - - C. A. 236

5. —— *With Will annexed—Charge of Debts—Renunciation by Executor—Power of Administrator with Will annexed to sell—22 & 23 Vict. c. 35, s. 16.*] A testator directed that his debts should be paid by his executors thereinafter named, and in case his personal estate should be insufficient, he charged his real estate with the deficiency; and he appointed two persons his executors. Both the executors renounced probate, and an administrator with the will annexed was appointed:—*Held*, on summons taken out under the *Vendor and Purchaser Act*, 1874, that the administrator with the will annexed had no power to sell the real estate, either under the terms of the will or by virtue of the 22 & 23 Vict. c. 35, s. 16. *In re* CLAY AND TETLEY - - - - - C. A. 3

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BANKRUPTCY — *Adjudication — Petition — Disputed Debt—Stay of Proceedings pending Trial of Validity of Debt—Discretion of Registrar—Waiver of Irregularity—Bankruptcy Rules*, 1870, *r.* 43.] When the proceedings on a bankruptcy petition have been stayed for the trial of the question of the validity of the petitioning creditor's debt, and the validity of the debt has been established by the judgment of a Court of first instance, the Registrar has a judicial discretion to proceed with the hearing of the petition and to make an adjudication of bankruptcy upon it, and is not bound to wait for a final decision of a Court of Appeal on the validity of the debt.—If, however, he is satisfied that a *boná fide* appeal is pending from the judgment of the Court of first instance, he ought to adjourn the further hearing of the petition until after the appeal is disposed of.—Before fixing a day for continuing the proceedings on the petition, the Registrar is bound to require the production of the judgment establishing the debt, or an office copy of it.—But, if the day is fixed irregularly, without the production of the judgment, the irregularity will be waived by the appearance of the debtor or his solicitor on the day fixed without taking the objection, which cannot then be raised at any subsequent stage of the proceedings.—*Held*, that an appeal from an adjudication of bankruptcy ought to stand over pending the trial of an action, the result of which, it was alleged by the Appellant, would be to render a fund available to satisfy the debt claimed by the petitioning creditor. *Ex parte* YEATMAN. *In re* YEATMAN - - - - C. A. 283

2. —— *Adjudication—Annulment — Registration of Resolution for Composition—Bankruptcy Act*, 1869, *ss.* 28, 80, *sub-s.* 10—*Bankruptcy Rules*, 1870, *r.* 266.] The Registrar has no power to register a resolution for liquidation or composition after an adjudication of bankruptcy has been made; unless the adjudication has been made under rule 266 of the Bankruptcy Rules, 1870, in which case the adjudication is intended to be merely ancillary to the liquidation.—*Ex parte Davis* (2 Ch. D. 231) overruled. *In re* STANLEY. *Ex parte* MILWARD - - - C. A. 256

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BANKRUPTCY—*continued.*

liquidation or composition, and such resolutions if passed will be inoperative.—*Ex parte Milward* (16 Ch. D. 256) explained and followed. *Ex parte* Bennett. *In re* Ward - - **C. A. 541**

4. —— *Composition — Creditor omitted from Statement of Affairs—Application after Registration of Resolutions to admit Proof—Jurisdiction of Court—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.] After the registration of simple composition resolutions (by which no trustee is appointed for the receipt and distribution of the composition and no security is given for its payment) the proceedings are at an end, and the Court of Bankruptcy has no jurisdiction to entertain an application by a creditor, who was omitted from the debtor's statement of affairs, and who has taken no part in the proceedings, for the admission of a proof of his debt.—*Ex parte Carew* (Law Rep. 10 Ch. 308) explained and distinguished.—*Breslauer* v. *Brown* (3 App. Cas. 672) explained.—Decision of *Bacon*, C.J., reversed. *Ex parte* Lacey. *In re* Lacey - - **C. A. 131**

5. —— *Composition—"Extraordinary Resolution"—Secured Creditor—Execution levied before Registration—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.] A non-assenting creditor of a compounding debtor under sect. 126 of the *Bankruptcy Act*, 1869, against whom no equity can be raised by reason of his personal conduct, can acquire a valid security for his debt by levying an execution on the debtor's goods at any time before the registration of the extraordinary resolution accepting the composition.—The resolution does not become an "extraordinary" one until it has been confirmed at the second meeting of the creditors, and it has no validity whatever until it is registered.—The mere fact that a judgment creditor, who is entered in the debtor's statement of affairs as having no security for his debt, is present in silence at the first meeting of the creditors, not proving his debt or taking any other part in the proceedings, will not raise an equity against him so as to prevent his levying an execution on his judgment, and thus acquiring a valid security for his debt before the registration of an extraordinary resolution accepting a composition. *Ex parte* McLaren. *In re* McColla - **C. A. 534**

6. —— *Debtor's Summons — Jurisdiction of Court—Residence of and carrying on of Business by Debtor—Bankruptcy Rules*, 1870, *r.* 17. — *Held*, that a debtor, who was employed as a clerk in a bank, the office of which was within the district of the *London* Bankruptcy Court, was within the meaning of rule 17 of the Bankruptcy Rules, 1870, "carrying on business" within the district of that Court, and that consequently that Court had jurisdiction to grant a debtor's summons against him.—The debtor's private residence was in one of the suburbs, outside the district of the *London* Court:—*Held*, by *James*, L.J., that he was also, within the meaning of rule 17, "residing" within the district of the *London* Court. *Ex parte* Breull. *In re* Bowie - - **C. A. 484**

7. —— *Debtor's Summons—Stay of Proceedings—Conditional Agreement for Reduction of Debt—Default in fulfilling Condition—Revivor of Original Debt — Penalty — Waiver — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 7.] A creditor having issued a debtor's summons in respect of a judgment debt of £344, an agreement was made that the debtor should give the creditor a cheque for £50, and three bills of exchange for £50 each, accepted by a third person, and payable respectively in three, six, and nine months, and that, upon payment of the cheque and the bills in due course, and a receipt for a debt due by the creditor to the debtor's brother being handed to the creditor, he should give a receipt in full satisfaction of the judgment debt. In default of payment of any or either of the cheque or bills, the creditor was to be at liberty to proceed for the full amount due. The cheque and the first two bills were paid in due course, but the third bill was not paid at maturity, the acceptor having forgotten to provide his bankers with funds to meet it. The creditor issued a writ against the acceptor, and he paid the dishonoured bill within a week after it became due. The creditor then issued a debtor's summons against the debtor for the unpaid balance of the original debt:—*Held*, that the provision in the agreement for the revivor of the original debt upon default being made in the performance of any of the conditions was not a penalty, but that on the dishonour of the third bill the creditor was remitted to his original right, and that he had not waived that right by suing the acceptor.—The debtor having applied to the Court of Bankruptcy to dismiss the summons:—*Held* (reversing the decision of the Registrar), that the proceedings on the summons ought not to have been stayed pending the trial of an action to determine the validity of the debt, but that the Registrar ought to have decided the question himself, and to have dismissed the application. *Ex parte* Burden. *In re* Neil - **C. A. 675**

8. —— *Disclaimer of Lease by Trustee—Extension of Time — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 24.] The mere fact that the lessor has availed himself of the provisions contained in the debtor's lease to compel the trustee in liquidation to pay half a year's rent in advance, is not, in the absence of negotiation, or of anything to mislead the trustee, or of special circumstances to excuse the delay, a ground for enlarging the time, after the expiration of the twenty-eight days (fixed by the *Bankruptcy Act*, 1869, s. 24), for notice to be given by the trustee, whether he disclaims the lease or not. *In re* Richardson. *Ex parte* Harris - - - - - - **613**

9. —— *Distress—Landlord and Tenant—Tenancy from Year to Year or at Will—Attornment Clause—Bankruptcy Act*, 1869, *s.* 34.] A mortgage deed contained an attornment clause whereby *A.* (the mortgagor) attorned and became tenant from year to year to *B.* (the mortgagee) for and in respect of the mortgaged premises, at the yearly rent of £800, to be paid by equal quarterly payments. And it was thereby agreed that it should be lawful for *B.*, at any time after three months from the date of the mortgage, without giving previous notice of his intention so to do, to enter upon and take possession of the premises whereof *A.* had attorned tenant, and to determine the tenancy created by the aforesaid attornment. *A.* filed a liquidation petition, and on the same day a receiver was appointed, who entered into pos-

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session of *A.'s* estate and effects.—Notice of the petition and of the appointment of a receiver was sent to *B.*, who two days later, by virtue of the attornment clause, distrained upon the goods and chattels on the mortgaged premises for a half-year's rent then due:—*Held* (affirming the decision of *Bacon*, C.J.), that a tenancy from year to year and not a tenancy at will was created by the attornment clause, and that *B.* was entitled, under the *Bankruptcy Act*, 1869, s. 34, to distrain for the rent due to him from *A.* at the time of filing the liquidation petition.—*Morton* v. *Woods* (Law Rep. 4 Q. B. 293) explained. *In re* Threlfall. *Ex parte* Queen's Benefit Building Society [C. A. 274

10. —— *Distress — Mortgage — Attornment Clause—Distress levied after Bankruptcy of Mortgagor—Fixtures—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 34—*Public-house—Goodwill.*] An attornment by a mortgagor to a second mortgagee is valid, notwithstanding the fact that the mortgagor has already attorned tenant to the first mortgagee of the same property. And if the amount of the rents fixed by the two attornment clauses is a fair rent of the property, so that there is no fraud on the bankrupt law, valid distresses can be levied by both mortgagees after the commencement of the bankruptcy of the mortgagor. —*Morton* v. *Woods* (Law Rep. 3 Q. B. 658; Ibid. 4 Q. B. 293) explained and followed.—A mortgage (by way of underlease) executed in 1877 of a leasehold public-house contained no express assignment of the fixtures. There was a clause by which, "for the purpose of better securing the punctual payment of the interest" on the mortgage debt, the mortgagor attorned tenant to the mortgagee of the mortgaged property at a yearly rent equal to the amount of a year's interest. And there was a proviso that the mortgagee might, at any time after the day when the first instalment of rent should become due, enter upon the property and determine the tenancy, without giving the mortgagor any notice to quit. Two years afterwards the mortgagor became bankrupt. The mortgagee had taken no step to determine the tenancy:—*Held*, that, as the tenancy was created only for the purpose of giving an additional security for the payment of the interest, the mortgagee did not cease to be a mortgagee because he was made a landlord, and that he was entitled as against the trustee in the bankruptcy of the mortgagor to trade fixtures which had been annexed to the public-house after the execution of the mortgage.—The goodwill of a public-house is not a personal goodwill, but on a sale of the house passes with it. *Ex parte* Punnett. *In re* Kitchin [C. A. 226

11. —— *Injunction—Action against Bankrupt in Colonial Court—Sequestration to compel Appearance—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 13—*Bankruptcy Rules*, 1870, *r.* 260.] Before issuing a sequestration against real estate of a bankrupt situate in a colony, for the purpose of compelling his appearance in an action in the Colonial Court to realize a mortgage given by him of other real estate in the colony, the leave of the Court of Bankruptcy ought to be obtained.—But where such a sequestration had been issued without leave, and an appearance had been entered in the colonial action:—*Held*, that it was sufficient that the Plaintiffs in the action should undertake not to use the sequestration for any other purpose. *Ex parte* Rogers. *In re* Boustead - C. A. 665

12. —— *Liquidation Petition—Debtor's Statement of Affairs — Distinction between Joint and Separate Debts and Assets — Debtor formerly in Partnership—Registration of Resolutions—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125—*Bankruptcy Rules*, 1870, *rr.* 287, 295.] A debtor, who in his liquidation petition describes himself as having been formerly in partnership, ought in his statement of affairs to distinguish between his joint and separate debts and assets, or to state expressly that no debts and no assets of the former partnership exist.—If the statement of affairs fails to do this, reolutions passed by the creditors under the petition ought not to be registered.—The statement of affairs ought not to be supplemented by affidavits filed after the meeting of the creditors. *Ex parte* Buckley. *In re* Buckley [C. A. 513

13. —— *Liquidation Resolutions—Registration —Small Amount of Assets—Bona fides of Creditors —Opposition by Judgment Creditor—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125—*Bankruptcy Rules*, 1870, *r.* 295.] The statement of affairs of a debtor who had filed a liquidation petition shewed that his debts were £1759 and his assets £85, the latter sum being subject to a deduction in respect to preferential debts. The creditors resolved upon a liquidation by arrangement, and gave the debtor an immediate discharge. They also voted £10 for the remuneration of the trustee. The registration of the resolutions was opposed by a creditor who had brought an action against the debtor for £182, but who had been restrained from proceeding with his action. He was in a position to sign judgment and issue execution so soon as the injunction should be dissolved:—*Held* (by *Bacon*, C.J., and by the Court of Appeal), that, notwithstanding the small amount of the assets, the resolutions ought to be registered, the contest being really whether the assets, such as they were, should be distributed among the creditors generally, or be swept away by the judgment creditor, and this although the judgment creditor offered in the Court of Appeal to undertake to present a bankruptcy petition against the debtor. —*Ex parte Early* (13 Ch. D. 300) followed.—*Ex parte Staff* (Law Rep. 20 Eq. 775) and *Ex parte Russell* (Law Rep. 10 Ch. 255) distinguished. *Ex parte* Mathewes. *In re* Sharpe - C. A. 655

14. —— *Liquidation by Arrangement—Subsequent Agreement to accept Composition—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 28—*Debtor left in Possession of Assets—Default in Payment of Composition—Rights of Trustee—Assignment of Book Debts by Debtor—Surety for Payment of Composition — Counter-Indemnity by Debtor.*] Two partners in trade filed a liquidation petition, under which a trustee of their property was appointed. Afterwards the creditors, under the provisions of sect. 28 of the *Bankruptcy Act*, 1867, passed resolutions authorizing the trustee to accept a composition from the debtors, and the arrangement was approved by the Court.

The composition was to be paid in four instalments, part of the last of which was to be secured by a surety. One of the debtors, who was about to carry on the business alone, agreed to pay £30 to the trustee weekly, until he should have paid the amount of the composition. In case of his making default, the trustee was to be at liberty to take possession of his stock-in-trade, assets, and effects, and realize them for the benefit of the creditors of the firm. The discharge of the debtors was to be granted, the liquidation closed, and the trustee released, so soon as the trustee should certify to the Court that a sum sufficient to pay the composition had been paid to him by the debtor. The first instalment was duly paid, but the debtor afterwards made default, and the trustee took possession of his stock-in-trade and effects. It then appeared that the debtors had, shortly before the seizure, executed a deed assigning the outstanding book debts of the firm to the surety and another person, as security for moneys advanced by them, and also as a security to the surety against his liability in respect of the last instalment of the composition. The advances had been made since the passing of the resolutions, to enable the debtor to carry on the business and to pay the first instalment of the composition:—*Held*, that the resolutions of the creditors gave an implied authority to the debtor to carry on the business in the ordinary way, and to pledge the assets in order to raise money for the purposes of the business, or for the purpose of paying the composition, and that the assignees were entitled to the book debts as a security for the advances which they had made.—But *held*, that the resolutions did not authorize the pledging of the assets as an indemnity to the surety against his liability in respect of the last instalment of the composition, and that the deed could not stand as a security in that respect. *Ex parte Burrell* (1 Ch. D. 537) distinguished. *Ex parte* Allard. *In re* Simons - - - - **C. A. 505**

15. —— *Liquidation by Arrangement—Subsequent Resolution of Creditors to accept Composition—Approval of Court—Judicial Discretion—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 28, 126.] In giving or withholding the approval of the Court to a composition with creditors, accepted by the proper majority under sect. 28 of the *Bankruptcy Act*, 1869, the Judge is exercising a judicial discretion, and is bound to consider the objections brought before him by a dissentient creditor, and to give his decision judicially upon sufficient reasons.—The power of the Court under sect. 28 is not limited, as in the case of a composition accepted by the resolution of two meetings of creditors under sect. 126, to setting aside the resolution on the ground of fraud in the proceedings.—The propriety of the resolutions is to be judged of by the Court upon the facts as they appear at the time when its approval is sought, not as they appeared at the time when the resolutions were passed.—The exercise of the discretion by the Judge is subject to appeal, but the Court of Appeal ought not to interfere unless it is clearly shewn that the Judge has exercised his discretion wrongly.—Decision of *Bacon*, C.J., reversed.—The fact that by composition resolutions

under sect. 28 no security was given for some of the instalments, and the management of the assets was intrusted to a debtor who for several years previously had indulged in recklessly extravagant expenditure:—*Held*, to be a sufficient reason for refusing to give the approval of the Court to the resolutions. *Ex parte* Merchant Banking Company of London. *In re* Durham - **C. A. 623**

16. —— *Practice—Appeal—Locus Standi—Appeal by Trustee in Bankruptcy—Removal of Trustee before Hearing—Refusal of New Trustee to prosecute Appeal—Costs.*] The trustee in a bankruptcy presented an appeal against the admission of a proof. Before the appeal came on for hearing the Appellant had been removed from his office, and a new trustee appointed, who declined to prosecute the appeal:—*Held*, that the Appellant had no *locus standi*, but that the appeal must stand over for a fortnight to give the creditors an opportunity of prosecuting it. At the end of the fortnight no creditor had adopted the appeal:—*Held*, that the appeal must be dismissed, and that the Respondent was entitled to have his costs paid out of the deposit, but that no personal order for costs could be made against the Appellant. *Ex parte* Sheard. *In re* Pooley (No. 2) - - - - - **C. A. 110**

17. —— *Practice—Appeal in Bankruptcy—Time for Appealing from County Court to Chief Judge—Bankruptcy Rules*, 1870, *r.* 143—*Bankruptcy Rule of 26th May*, 1873—*Rules of Court*, 1875, *Order* LVIII., *rr.* 9, 15.] Notwithstanding the rules under the Judicature Acts, the time for appealing to the Chief Judge from an order made in a bankruptcy matter by a County Court is still regulated by the Bankruptcy Rules. And, in reckoning the twenty-one days allowed by rule 143 of the Bankruptcy Rules, 1870, for appealing, Sundays are, by virtue of the Rule in Bankruptcy of the 26th of May, 1873, not to be taken into account. *Ex parte* Hall. *In re* Alven [**C. A. 501**

18. —— *Proof in Bankruptcy—Bill of Exchange—Accommodation Bill deposited as Security for less than its nominal Amount.*] When a bill of exchange, accepted for the accommodation of the drawer, is deposited by him as security for a debt less than the amount of the bill, the holder is entitled to prove in the bankruptcy of the acceptor for the full amount of the bill, though he cannot receive dividends in excess of the debt due to him by the drawer. Decision of *Bacon*, C.J., reversed. *Ex parte* Newton. *Ex parte* Griffin. *In re* Bunyard - - **C. A. 330**

19. —— *Proof in Bankruptcy—Partner—Administrator of Deceased Partner—Share of Deceased Partner's Capital retained in Business without Authority.*] Three persons carried on business in partnership without any articles of partnership. The profits were divided between them in equal shares. After the death of one of them the survivors continued to carry on the business, retaining in it, without any authority, the deceased partner's share of the capital, and dividing the profits of the business between themselves equally. They afterwards filed a liquidation petition. There were still some joint debts of the partnership of the three remaining unpaid:—*Held*, that

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the administratrix of the deceased partner could not prove in the liquidation in competition with his creditors in respect of his share of the capital. —*Nanson* v. *Gordon* (1 App. Cas. 195) followed. —*Ex parte Westcott* (Law Rep. 9 Ch. 626) distinguished. *Ex parte* Blythe. *In re* Blythe [620

20. —— *Receiver in Bankruptcy—Application for Payment of Remuneration—Complaint against Trustee — Locus Standi —"Person aggrieved"— Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 20 —*Bankruptcy Rules*, 1871, *rr.* 3, 7.] A receiver in bankruptcy or liquidation has no lien upon the assets for his remuneration; he is only entitled to be paid out of the net assets.—And he is not entitled to come to the Court to complain of the conduct of the trustee in the administration of the assets.—Such a complaint can be made only by the creditors. *Ex parte* Browne. *In re* Maltby - - - - - - C. A. 497

21. —— *Trustee—Removal of Trustee—Judicial Discretion—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 83, *sub-s.* 4.] A trustee in bankruptcy can be removed by the Court from his office under sect. 83, sub-sect. 4, of the *Bankruptcy Act*, 1869, only upon good cause shewn, not at the mere discretion of the Registrar.—But, in making an order for the removal of a trustee for good cause, the Registrar is exercising a judicial discretion, and if he has exercised his discretion according to law, the Court of Appeal will not disturb his order. *Ex parte* Sheard. *In re* Pooley (No. 1) [C. A. 107

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BANKRUPTCY RULES, 1871, rr. 3, 7 - 497
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BILL OF EXCHANGE—Proof in bankruptcy—Accommodation bills - - 330
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BILL OF SALE—*Registration*—"*Apparent Possession*" *of Grantor—Actual Possession of Sheriff under Execution—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31, *s.* 8.] If the goods comprised in an unregistered bill of sale are, at the time of the filing of a bankruptcy petition against the grantor, in the actual visible possession of the sheriff under an execution, issued either by the grantee or by a third person, they are not, even though the grantee has himself taken no possession, in the "apparent possession" of the grantor, and the *Bills of Sale Act* does not apply.—*Ex parte Mutton* (Law Rep. 14 Eq. 178) not followed. *Ex parte* Saffery. *In re* Brenner - - - C. A. 668

2. —— *Registration — "Growing Crops" — Severance—Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 7.] Though a bill of sale under the *Bills of Sale Act*, 1854, does not require registration in respect of growing crops, yet, when the crops are subsequently severed by the grantor they become personal chattels, and, if possession has not been taken of them by the grantee before the commencement of the bankruptcy of the grantor, they will pass to the trustee in the bankruptcy.—*Brantom* v. *Griffits* (1 C. P. D. 349; 2 C. P. D. 212) distinguished. *Ex parte* National Mercantile Bank. *In re* Phillips [C. A. 104

3. —— *Statement of Consideration—Bills of Sale Act*, 1878 (41 & 32 *Vict. c.* 31), *s.* 8.] In the operative part of a bill of sale it was expressed to be made in consideration of £120 advanced upon its execution by the grantee to the grantor. In fact, only £90 was paid to the grantor, £30 being retained by the grantee for "interest and expenses." The execution of the deed was attested by a solicitor, and the attestation clause stated that before its execution the effect of the deed was explained by him to the grantor. At the foot of the deed, immediately after the attestation clause, there was a receipt, signed by the grantor, which stated that the £90, "together with the agreed sum of £30 for interest and expenses," made the sum of £120, "the consideration money within expressed to be paid":—*Held*, that the receipt was not part of the deed; and that the deed did not set forth the consideration for it, and was therefore made, by sect. 8 of the *Bills of Sale Act*, 1878, void as against the trustee in the liquidation of the grantor.—*Ex parte National Mercantile Bank* (15 Ch. D. 42) distinguished. *Ex parte* Charing Cross Advance and Deposit Bank. *In re* Parker - - - - C. A. 35

4. —— *Statement of Consideration — Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 8.] A bill of sale is not vitiated under sect. 8 of the *Bills of Sale Act*, 1878, because a part of the sum stated in it as the consideration is retained by the grantee to pay the solicitor's costs of preparing the deed and a further agreed sum for costs previously incurred, and the fee of an auctioneer for valuing the property with a view to making the loan.—Decision of *Bacon*, C.J., reversed.—*Ex parte Charing Cross Advance and De-*

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posit Bank (16 Ch. D. 35) distinguished.—The "consideration" mentioned by sect. 8 is that which the grantor receives for giving the bill of sale, not necessarily the amount secured by it.—A bill of sale was given to secure, not only a present advance, but also the amount for the time being due to the grantee upon a mortgage including future advances which had been previously given to him by the grantor. The recitals in the bill of sale in stating the amount then due on the mortgage omitted a sum which had been advanced on a bill then current:—*Held*, that this misstatement formed no objection under sect. 8 to the validity of the bill of sale. *Ex parte* CHALLINOR. *In re* ROGERS - - - C. A. 260

—— Building contract—Power to seize materials
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BONA FIDES—Creditors—Resolution for liquidation - - - - 655
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BUILDING CONTRACT — *Forfeiture — Waiver—Power for Landlord to seize Materials on Default of Builder—Seizure after Act of Bankruptcy by Builder—Bill of Sale—Registration—"License to take Possession of Personal Chattels as Security for any Debt"—Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 7.] A building agreement between a landowner and a builder contained a stipulation that the landowner, upon the default of the builder in fulfilling his part of the agreement, might re-enter upon the land and expel the builder, and that on such re-entry all the materials then in and about the premises should be forfeited to and become the property of the landowner "as and for liquidated damages":—*Held*, that this stipulation was not a bill of sale within the meaning of sect. 7 of the *Bills of Sale Act*, 1854, inasmuch as, though it was a "licence to take possession of personal chattels," the possession was not to be taken "as security for any debt."—Decision of *Bacon*, C.J., reversed.—*Semble*, that if the ground of forfeiture was the omission of the builder to complete the buildings on the day appointed by the agreement, and the landowner had after that day made advances of money to the builder for the purposes of the agreement, or had in any other way treated the agreement as still subsisting, he would have waived the forfeiture.—The decision in *Doe* v. *Brindley* (12 Moo. C. P. 37) questioned.—Under such a stipulation, the interest of the builder in the materials being a defeasible one, the right of the landowner to seize is not defeated by the commission of an act of bankruptcy by the builder before the seizure is made. The trustee in bankruptcy of the builder takes subject to the right of the landowner under the agreement. *Ex parte* NEWITT. *In re* GARRUD - C. A. 522

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—— *Bute (Marquis of)* v. *Cunynghame* (2 Russ. 275), observations upon - - 211
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—— *Carew, Ex parte* (Law Rep. 10 Ch. 308), explained and distinguished - 131
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—— *Charing Cross Advance and Deposit Bank, Ex parte* (16 Ch. D. 35), distinguished
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—— *Crookes* v. *Whitworth* (10 Ch. D. 289) not followed - - - - 362
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—— *Staff, Ex parte* (Law Rep. 20 Eq. 775), distinguished - - - - 655
See Bankruptcy. 13.

—— *Stains* v. *Banks* (9 Jur. (N.S.) 1049); reversed on appeal, Reg. Lib. 7 B., 1863, 1761) considered - - - 53
See Mortgage. 6.

—— *Thames-Haven Dockyard and Railway Company* v. *Rose* (4 Man. & G. 552) considered - - - - 681
See Company. 1.

—— *Treloar* v. *Bigge* (Law Rep. 9 Ex. 151) followed - - - - 387
See Landlord and Tenant. 1.

—— *Westcott, Ex parte* (Law Rep. 9 Ch. 626), distinguished - - - 620
See Bankruptcy. 19.

—— *Wheeldon* v. *Burrows* (12 Ch. D. 31) considered - - - - 355
See Light.

—— *Wootton's Estate, In re* (Law Rep. 1 Eq. 589), followed - - - - 597
See Lands Clauses Act. 1.

CHARGE—Debt of married woman — Separate estate—Injunction - - 371, 660
See Practice. 14.

—— Debts—Will - - - - - 3
See Administrator. 5.

—— On land - - - - - 173
See Charity.

—— On officer's commission money - 571
See Mortgage. 5.

—— Statutory—Execution of works by company
See Company. 5. [411

CHARITY—*Mortmain — Void Legacy — Apportionment—Charge on Land—Proceeds of Sale.*] A testator gave a share of his residuary personal estate to charities. His residuary estate consisted of a legacy from another testator payable out of the proceeds of that testator's real and mixed estate and pure personal estate:—*Held*, that the bequests to the charities must be apportioned according to the values of the real and mixed estate and personal estate of the first testator, and that the bequests failed as to the portion attributable to the real and mixed estate, but were good as to the portion attributable to the pure personal estate. *In re* Hill's Trusts 173

CLASS—Gift to - - - - 44
See Will. 4.

COLLATERAL SECURITY. - 211, 214, n.
See Mortgage. 2, 3.

COLONIAL COURT—Sequestration—Bankruptcy
See Bankruptcy. 11. [665

COMMISSION—Value of, on retirement—Charge on - - - - - 57
See Mortgage. 5.

COMPANY—*Articles of Association—Directors—Business to be conducted by not less than a certain Number—Call — Forfeiture — Ultrà Vires.*] Where the articles of association of a company provide that "the business of the company shall be conducted by not less than" a specified number of directors, the words are imperative, not merely directory: consequently a call made or a forfeiture of shares declared by less than the specified number of directors is invalid.—The articles of association of a limited company provided (Art. 35) that "the business of the company should be conducted by not less than five nor more than seven directors": also that the office of director should be vacated on bankruptcy or insolvency; and that "the directors might determine the quorum necessary for the transaction of business."—The articles named six persons only as directors, of whom *B.* was one. These directors fixed three of their number as a quorum.—In October, 1877, the number of directors being then reduced by death to five, *B.* became insolvent and therefore disqualified as a director.—In November the company passed, at an ordinary meeting, a resolution altering article 35 by substituting "three" directors for "five." This resolution was admitted to be invalid as not having been passed in accordance with the articles.—In December the four remaining directors made a call. *B.* having made default in payment of this call, as well as a former call made prior to his insolvency, the same directors passed a resolution declaring his shares forfeited.— The company afterwards passed a resolution for a voluntary winding-up, in the course of which it turned out that there were surplus assets available for division among the shareholders:—*Held*, that the second call and the forfeiture, having been made and declared by four directors only, were invalid: and, therefore, that *B.* was entitled, on payment of his calls to the liquidator, to be treated as a shareholder, and to participate in the surplus assets accordingly. *Thames-Haven Dock and Railway Company* v. *Rose* (4 Man. & G. 552), and *Kirk* v. *Bell* (16 Q. B. 290) considered. *In re* Alma Spinning Company. Bottomley's Case [681

2. —— *Contract by Promoters — Ratification by Company —Contract to pay Money to Third Party.*] *A.* and *B.* agreed with *C.*, on behalf of a company intended to be formed, that *A.* and *B.* should sell and the company buy a certain business, and it was a term of the agreement that sixty guineas should be paid to *J. & P.*, solicitors, for their expenses and charges in registering the company. The memorandum of association adopted this agreement, and the directors subsequently ratified it. An order having been made for winding up the company, *J. & P.* claimed to prove for the sixty guineas:—*Held* (affirming the

COMPANY—*continued.*

decision of *Little*, V.C.), that the claim must be disallowed, for that the contract between *A.* and *B.* and *C.* having been entered into before the company was in existence, could not by mere ratification be made binding on the company, and that a contract between *A.* and *B.* and the company, to which *J. & P.* were in no way parties, that the company should pay money to *J. & P.*, would not entitle *J. & P.* to proceed against the company. *Gregory* v. *Williams* (3 Mer. 582) explained. *In re* EMPRESS ENGINEERING COMPANY C. A. 125

3. —— *Debentures — Railway Company — Mortgages and Debenture Bonds — Debenture Stock—Priorities — Lands Clauses Consolidation Act*, 1845—*Companies Clauses Act*, 1863, *Part III. —Cornwall Minerals Railway Companies Acts*, 1873, 1875, *and* 1877—*Practice—Rules of Court*, 1875, *Order XXXIV., r.* 1, *Special Case under.*] By the *Cornwall Minerals Railway Act*, 1873, the company were empowered to borrow on mortgage to the extent of £250,000, and to issue debenture stock subject to the provisions of Part III. of the *Companies Clauses Act*, 1863, "but notwithstanding anything therein contained" the interest of all debenture stock "at any time created by the company" was to rank *pari passu* with the interest of all mortgages "at any time granted" by the company, and should have priority over all principal moneys secured by such mortgages.—By a later Act of 1875 the company were empowered to raise additional capital, and in respect thereof to borrow a further sum on mortgage, and after providing that the principal secured by all mortgages granted by the company before the passing of that Act should have priority over the principal secured by all mortgages granted under that Act, the company were empowered to issue debenture stock subject to the provisions of the Act of 1863, but the interest of all debenture stock created and issued at any time after the passing of that Act was to rank *pari passu* with the interest of all mortgages at any time after the passing of that Act granted by the company, and should have priority over all principal moneys secured by such mortgages.—By another Act of 1877 power to raise a further sum by the issue of debenture stock under provisions similar to those in the Act of 1875 was given to the company.—The revenues of the company being insufficient to pay in full the interest on the mortgages and debenture stock granted and issued by the company under these powers, a receiver of the undertaking was appointed by the Court; and upon a special case stated under Rules of Court, 1875, Order XXXIV., rule 1, in an action brought for the purpose, it was held—First, that, notwithstanding the words "at any time" in the Act of 1873, the enactment therein contained applied only to the mortgage debt and debenture stock for which provision was made by the Act; and consequently that the interest on the subsisting mortgages granted and debenture stock issued under the Act of 1873, had priority over the interest of all debenture stock created under the subsequent Acts of 1875 and 1877, and that such interest was payable *pari passu* to the mortgagees and holders of debenture stock having such priority.—Secondly, that the

COMPANY—*continued.*

enactments of the Act of 1875 operated as to debenture stock created and issued after the passing of that Act under the powers of the Act of 1873, as well as to that created and issued under the Act of 1875, but had no operation as to debenture stock created and issued under the Act of 1877.—Thirdly, that the principal of the mortgages for the time being due would by means of the appointment of a receiver under a section in that behalf of the Act of 1873 contained have priority of payment next after the interest having priority as aforesaid; and—Fourthly, that the holders of mortgages of the company which had not yet become due were not entitled to any lien in respect of their principal on the moneys in the hands of the receiver.—Where a special case for the opinion of the Court is stated in an action pursuant to the Rules of Court, 1875, Order XXXIV., rule 1, and the answers to the special case in fact dispose of the action, the proper course is to take the answers in the shape of a judgment, making declarations to the effect of the answers, the action being, if necessary, set down *pro formâ* for trial on motion for judgment. HARRISON *v.* CORNWALL MINERALS RAILWAY COMPANY - 66

4. —— *Dividend — Tramway Company — Maintenance of Works—Depreciation of Capital—Reinstating Capital — Reserve Fund — Ordinary Shareholders—Preference Shareholders—Dividend —Payment out of Capital—"Net Profits"—Profits of particular Year.*] The articles of association of a limited tramway company provided that no dividend should be declared except "out of profits"; that the directors should, with the sanction of the company, declare annual dividends "out of profits": and that the directors should, before recommending a dividend, set aside "out of profits," subject to the sanction of the company, "a reserve fund for maintenance, repairs, depreciation, and renewals." The company had for several years carried on their business, paying a dividend half-yearly on their ordinary shares; but they failed to set apart a reserve fund adequate for the maintenance of their tramway, which eventually became worn out. The company having again declared a half-yearly dividend on their ordinary shares, and the total sum appropriated for the dividend being, as it appeared, much less than the sum required to reinstate the tramway:—*Held*, that the company could only declare a dividend out of the net profits, and that the net profits could not be ascertained without first restoring the tramway to an efficient condition, or making due provision for the purpose out of the company's assets. An injunction was accordingly granted restraining the company from paying the half-yearly dividend they had declared, but leave was given them to move to dissolve the injunction, in the event of their being able to satisfy the Court that there were profits available for the dividend:—*Held*, however, that the holders of preference shares, the dividend on which was "dependent on the profits of the particular year only," were entitled to a dividend out of the profits of any year after setting aside a proportionate amount sufficient for the maintenance of the tramway for that year only; and were not to

COMPANY—*continued.*

be deprived of that dividend in order to make good the sums which in previous years should have been set aside by the company for maintenance, but which had been improperly applied by them in paying dividends. DENT *v.* LONDON TRAMWAYS COMPANY, **344**. DAVISON *v.* GILLIES [**347**, n.

5. —— *Mortgage—Priority—Salvage—Statutory Charge—Condition Precedent—"Owner of a Limited Interest in Land"—Special Act—Borrowing Powers — Directory Clauses — Companies Clauses Consolidation Act*, 1845 (8 *Vict.* c. 16), *ss.* 41, 42.] The special Act (11 & 12 Vict. c. 142) incorporating a company for the purpose (*inter alia*) of draining and reclaiming land, empowered the "owner of a limited interest in land" to contract with the company for the execution of drainage and reclamation works, and for that purpose to charge on the land (in the manner provided by the Act), the cost of executing the works. The Act defined the term "owner of a limited interest in land," as including "any person entitled to any land subject to any mortgage or charge thereon, provided such person shall be in possession of the land mortgaged or charged":—*Held*, that this definition included a purchaser in possession of land upon which the vendor had a lien for unpaid purchase-money.—The Act provided (by sect. 34) that, "from and after the due execution of the works mentioned in any contract" (between the company and an owner of land) "or any part of any such works, such execution, together with the amount due in respect of the same, being duly certified by three directors of the company under the seal of the company, the company shall be entitled to, and shall have a lien and charge upon the lands so drained, &c., for the moneys or money mentioned in such certificate as aforesaid . . . and such lien or charge shall have priority over every other charge or incumbrance affecting the same land," except ground rents and tithe commutation rent-charge:—*Held*, that the certificate of the directors was not conclusive, but only *primâ facie* evidence of the due execution of the works mentioned in it, and that if, notwithstanding the certificate, it was shewn that the works had not been duly executed according to the contract, the company would not be entitled to the statutory charge on the land as against a prior incumbrancer, or even as against the equitable owner.—A second mortgagee who is in possession of the mortgaged property and expends money in permanently improving or preserving it, is not entitled as against the first mortgagee to any charge on the property for the money so expended.—The 41st and 42nd sections of the *Companies Clauses Act*, 1845, requiring mortgages to be duly stamped and the consideration to be duly stated, do not make void an instrument the consideration for which is apparent, though it is not in terms stated.—A provision in a company's special Act that moneys were to be borrowed by order of a general meeting:—*Held*, to be directory only, and not to postpone money borrowed without such order to other mortgages of the company, ranking in other respects *pari passu*.—The borrowing powers of companies and the priorities of mortgagees under the 42nd section of the *Companies*

COMPANY—*continued.*

Clauses Act considered. LANDOWNERS WEST OF ENGLAND AND SOUTH WALES LAND DRAINAGE AND INCLOSURE COMPANY *v.* ASHFORD - **411**

6. —— *Winding-up — Execution Creditor — Judicature Act*, 1875, *s.* 10 — *Bankruptcy Act*, 1869, *s.* 87—*Companies Act*, 1862, *ss.* 85, 87.] A creditor having recovered judgment against a company, the sheriff, on the 10th of July, 1880, seized the goods of the company under a *fi. fa.* for £89. On the 14th of July a winding-up petition was presented, and on the 15th of July an order was made restraining all further proceedings in the action until the petition was disposed of or withdrawn. The sheriff thereupon withdrew from possession. On the 30th of July a winding-up order was made. On the 31st of July the creditor applied for leave to enforce his judgment, and the value of the goods seized being much greater than the amount of the debt, an order was made by *Malins*, V.C., that the liquidator should pay the amount of the debt:—*Held*, on appeal, that this order was right.—Sect. 87 of the *Bankruptcy Act*, 1869, which deprives execution creditors of the fruits of the execution where the sheriff has notice of a bankruptcy within fourteen days after sale, is not made applicable to the winding-up of companies by the *Judicature Act*, 1875, s. 10.—*In re Richards & Co.* (11 Ch. D. 676) approved.—*In re Printing and Numerical Registering Company* (8 Ch. D. 535) overruled. *In re* WITHERNSEA BRICKWORKS - - - - - **C. A. 337**

7. —— *Winding-up — Mutual Insurance Society—Contributory—Liability of Shareholders and participating Policy-holders inter se—Partnership —Participation in Profit and Loss.*] The articles of association of an unlimited mutual insurance society provided that the company should at first consist of two classes of members, namely, shareholders, so long as there should be any, and assurance members, who were policy-holders with participation in the profits and registered as members; and that when the shareholders should be paid off under the scheme provided for, then the company should consist of assurance members only. The shareholders were to have £6 per cent. on their paid-up calls, and every three years the profits were to be calculated, and one-fourth paid to the shareholders, and the other three-fourths carried to the assurance fund and appropriated by way of bonus to the policies of the participating policy-holders who had paid five years' premiums. The company was wound up before the shareholders had been paid off, and the participating policy-holders were declared by the Court to be contributories:—*Held* (affirming the decision of *Malins*, V.C.), that although the participating policy-holders were members and contributories under the special terms of the articles, they could not be called upon to contribute until the shareholders had been exhausted.—The presumption of law that in the absence of express stipulation partners must share losses in the same proportion as they share profits, *held* not to apply to such a case, the assured members having no direct participation in profits. *In re* ALBION LIFE ASSURANCE SOCIETY - - - - **C. A. 83**

8. —— *Winding-up—Mutual Life Assurance Society—Jurisdiction—Liability of Members—Dis-*

COMPANY—*continued.*

puted Claim—Evidence—Reduction of Amount of Contracts—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 91—*Life Assurance Companies Act*, 1870 (33 & 34 *Vict. c.* 61), *ss.* 21, 22.] The Court has, by virtue of sect. 2 of the *Life Assurance Companies Act*, 1870, jurisdiction to wind up an unregistered mutual life assurance society under the *Companies Act*, 1862.—But, *semble*, that the holders of policies in such a society are not liable to contribute to the payment of any debts; and that all that can be done in the winding-up is (after payment of the costs) to distribute the funds of the society among the policy-holders in proportion to the amounts of their respective claims.—When a company, respondents to a winding-up petition, dispute the validity of the petitioner's debt they must adduce on the hearing such evidence as will shew the Court that there is a question to be tried. If they fail to do this, a winding-up order ought to be made.—Two petitions having been presented by policy-holders for the winding-up of a mutual life assurance society, the society admitted their insolvency, and a winding-up order was made on the second petition, on the ground that the validity of the first petitioner's debt was disputed. But liberty was given to the first petitioner to apply for the costs of her petition, if her claim should be ultimately established. She appealed, and before the appeal came on for hearing a committee of policy-holders was formed, who desired that the Court should exercise the power given to it by sect. 22 of the *Life Assurance Companies Act*, 1870, of reducing the amount of the contracts of the society instead of making a winding-up order:—*Held*, that this power could not be exercised so long as the winding-up order remained, and that the order ought to be discharged, and a meeting of the policy-holders summoned in order to ascertain their wishes.—And the further hearing of the appeal was adjourned until after the meeting should have been held. *In re* GREAT BRITAIN MUTUAL LIFE ASSURANCE SOCIETY - **C. A. 246**

9. —— *Winding-up—Practice—Action—Interrogatories—Corporation—Rules of Court*, 1875, *Order XXXI., rr.* 1, 4.] The liquidator of a company is entitled to deliver interrogatories to a person claiming to prove who has made an affidavit of documents *In re* ALEXANDRA PALACE COMPANY - - - - - - - **58**

10. —— *Winding-up—Preferential Debt—Servants' Wages—Rule in Bankruptcy*—32 & 33 *Vict. c.* 71, *s.* 32.] The rule in bankruptcy that servants' wages shall be paid in priority to all other debts, is, by sect. 10 of the *Judicature Act*, 1875, extended to windings up.—*In re Albion Steel and Wire Company* (7 Ch. D. 547) followed. *In re* ASSOCIATION OF LAND FINANCIERS - **373**

11. —— *Winding-up—Secured Creditor—Failure of Security—Creditors' Right to prove—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 107—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Rules*, 1870, *rr.* 99–102.] A creditor of a company, believing himself to be fully secured by the hypothecation under the hand of the managing director of a call on the company's shares, made no claim for his debt in the winding-up. The security turning out defective, by reason of the call moneys having been paid away partly

COMPANY—*continued.*

before and partly since the letter of hypothecation:—*Held*, that the creditor, never having assessed the value of his security, was not prevented by the operation of sect. 10 of the *Judicature Act*, 1875, and rule 101 of the Bankruptcy Rules, 1870, from coming in and proving for the unsecured balance of his debt, on the terms of his disturbing no past dividend. *In re* KIT HILL TUNNEL. *Ex parte* WILLIAMS - - - **590**

COMPOSITION - - **131, 256, 505, 534, 623**
See BANKRUPTCY. 2, 4, 5, 14, 15.

—— Disqualification of alderman - - **143**
See MUNICIPAL CORPORATION.

—— Right of retainer by executor of creditor
See EXECUTOR. 3. [**202**

COMPROMISE—Infant - - - - - **41**
See INFANT. 1.

COMPULSORY POWERS—Taking land—Limited owner—Special Act - - - **411**
See COMPANY. 5.

CONDITION—Reduction of debt—Non-performance - - - - - - **675**
See BANKRUPTCY. 7.

—— Restraint of marriage - - - - **188**
See WILL. 1.

CONSENT—Assignment of lease—Unreasonable refusal - - - - - **387**
See LANDLORD AND TENANT. 1.

CONSIDERATION—Bill of sale—Statement of
See BILL OF SALE, 3, 4. [**35, 260**

CONSOLIDATED ORDERS XXXIII., r. 7 - **594**
See PRACTICE. 12.

CONSOLIDATION—Mortgage - - - **117**
See MORTGAGE. 1.

CONTEMPORANEOUS CONVEYANCES — Easements - - - - - - **355**
See LIGHT.

CONTEMPORANEOUS SECURITIES — Freehold and leasehold - - - **211, 214, n.**
See MORTGAGE. 2, 3.

CONTINGENT INTEREST - - - - **691**
See POWER. 2.

CONTRACT—For benefit of third party - **290**
See PRINCIPAL AND SURETY.

—— Promoter—Ratification by company - **125**
See COMPANY. 2.

CONTRIBUTORY - - - - - **83**
See COMPANY. 7.

CONVERSION—Power of sale of land—Reinvestment in Government funds - **648**
See POWER. 3.

—— Sale under Partition Act—Married woman
See PARTITION SUIT. 2. [**362**

CORPORATION—Discovery—Winding-up - **58**
See COMPANY. 9.

COSTS—Abandoned appeal - - - - **273**
See PRACTICE. 6.

—— Abandoned motion - - - - **559**
See PRACTICE. 7.

—— Appeal—Bankruptcy - - - - **110**
See BANKRUPTCY. 16.

—— Between solicitor and client - - **393**
See SOLICITOR. 1.

COSTS—*continued.*
—— Inquiry as to damages - - - 81
See Practice. 9.
—— Lien for - - - - - 617
See Solicitor. 2.
—— Production of documents - - 517
See Practice. 10.
—— Taxation—Affidavit of increase - 726
See Practice. 8.
—— Tenant for life—Protection of estate
See Settled Estate. 1, 2. [587, 588, n.

COUNSEL—Request for sale by—Married woman
See Partition Suit. 2. [362

COUNSEL'S FEES - - - - 517
See Practice. 10.

COVENANT—*Covenant not to use Premises as a Public-house, Tavern, or Beershop—Sale of Beer to be consumed off the Premises.*] A deed contained a covenant by the grantee of a piece of land that no building to be erected on the land should be used as a public-house, tavern, or beershop.—A lessee of the grantee obtained an off license authorizing him to sell at his shop, on the land, beer not to be drunk on the premises, and sold beer there accordingly:—*Held* (affirming the decision of the Master of the Rolls), that this was a breach of the covenant.—*Bishop of St. Albans* v. *Battersby* (3 Q. B. D. 359), approved. London and Suburban Land and Building Company *v.* Field - - - C. A. 645

2. —— *Injunction—"Beerhouse"—Construction—Technical Meaning—Evidence.*] A person who had entered into a covenant not to use a house as a public-house, tavern, or beerhouse, opened a grocer's shop there, at which he carried on the sale of beer to be drunk off the premises as an ancillary business to his grocer's business: *Held*, that this was no infringement of the covenant.—Evidence to shew that the word "beerhouse" was understood in the trade in a technical sense rejected. Holt & Co. *v.* Collyer - 718
—— Leaseholds—Indemnity of trustees - 723
See Trustee.
—— To settle future property - - 207
See Settlement.

CUSTODY—Infants' Custody Act - - 115
See Infant. 2.

CUSTOMARY RENT - - - - 730
See Landlord and Tenant. 2.

DAMAGES—Inquiry as to - - - 81
See Practice. 9.
—— Measure of—Guarantee - - 290
See Principal and Surety.
—— Measure of—Improper sale by solicitor 393
See Solicitor. 1.

DE BENE ESSE—Examination - - 100
See Practice. 11.

DEATH BEFORE TESTATOR - - 18
See Power. 1.

DEATH OF PROTECTOR—Estate tail - 176
See Tenant in Tail.

DEBENTURE—Debenture stock—Priority 66
See Company. 3.

DEBTOR'S SUMMONS - - - 484, 675
See Bankruptcy. 6, 7.

DEDICATION OF HIGHWAY - - 449
See Metropolis Management Act.

DEFAULT OF PAYMENT OF COMPOSITION 505
See Bankruptcy. 14.

DIRECTOR—Act done by less than a quorum
See Company. 1. [681

DISCLAIMER—Lessor's title—Ejectment 730
See Landlord and Tenant. 2.
—— Trustee in Bankruptcy - - 613
See Bancruptcy. 8.

DISCONTINUANCE OF ACTION—Costs - 559
See Practice. 7.

DISCOVERY—Goods sold - - - 93
See Practice. 15.
—— Interrogatories—Winding-up - 58
See Company. 9.
—— Particulars of demand - - - 13
See Practice. 17.

DISCRETION OF COURT—Notice to third party
See Practice. 18. [489
—— Judge in bakruptcy - - - 623
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—— Removal of trustee in bankruptcy - 107
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DISPUTED DEBT—Petition for adjudication 283
See Bankruptcy. 1.

DISQUALIFICATION—Alderman - - 143
See Municipal Corporation.

DISTRESS—After bankruptcy - 226, 274
See Bankruptcy. 9, 10.
—— Mortgage—Attornment clause - 226
See Bankruptcy. 10.

DIVIDEND—Payment out of profits - 344
See Company. 4.

DOCUMENTS—Inspection of—Deceased lunatic
See Lunatic. [673
—— Production of—Costs - - - 517
See Practice. 10.

DOMICIL—Foreign administration - 407
See Administrator. 3.

DOMINANT AND SERVIENT TENEMENTS 355
See Light.

DURANTE MINORE ÆTATE - - 49
See Administrator. 2.

EASEMENT—*Prescription Act* (2 & 3 *Will.* 4, *c.* 71), *s.* 8—*Computation of Period of Forty Years—Exclusion of Life Estate—"Person entitled to any Reversion"—Practice—Amendment of Pleadings—Alteration of Case—Rules of Court*, 1875, *Order xxvii., r.* 1.] The words in sect. 8 of the *Prescription Act*, "any person entitled to any reversion expectant on the determination" of a life estate, are not limited to an owner of the whole reversion, but include a tenant at will to such an owner. Therefore, if, within three years after the determination of a life estate in land, an action is brought by a tenant at will to the reversioner against the claimant of an easement by prescription over the land, the term of the tenancy for

EASEMENT—*continued.*
life is to be excluded in the computation of the period of forty years mentioned in the Act. The Plaintiff claimed to be tenant in possession of a part of the foreshore of the sea at *Margate*, and he sought to restrain the Defendant from removing shingle from the foreshore, and from placing bathing machines upon it. The Defendant claimed by forty years' enjoyment an easement entitling him to do the acts complained of, and by his statement of defence he denied that the Plaintiff was or ever had been in possession of the foreshore in question, "save subject to the rights of the Defendant." At the trial the Defendant asked for leave to amend his statement of defence by striking out the qualifying words, making the denial of the Plaintiff's possession an absolute one, and claiming the ownership of the foreshore:—*Held*, that the Defendant could not be allowed thus completely to change his case.
LAIRD *v.* BRIGGS - - - - 440
—— Light - - - - - 355
See LIGHT.

EJECTMENT—Disclaimer of lessor's title - 730
See LANDLORD AND TENANT. 2.

ELECTION—Sale under partition action—Married woman - - - 362
See PARTITION SUIT. 2.

ENGINEER—Lien on ship - - - 604
See SHIP. 1.

EQUITABLE EXECUTION - - - 544
See PRACTICE. 18.

EQUITY TO SETTLEMENT — Infant married woman—Payment out of Court - 376
See HUSBAND AND WIFE.

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EVIDENCE—Agreement in several documents 395
See SPECIFIC PERFORMANCE.
—— Agreement to take, by affidavit - 100
See PRACTICE. 11.
—— Judgment debtor - - - 8
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—— Technical meaning of "beerhouse" - 718
See COVENANT. 2.
—— Winding-up petition - - - 246
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EX PARTE APPLICATION - - 489
See PRACTICE. 20.

EXAMINATION—Judgment debtor - 8
See PRACTICE. 13.
—— *De bene esse* - - - - 100
See PRACTICE. 11.

EXECUTION—Before composition - - 534
See BANKRUPTCY. 5.
—— Unregistered bill of sale—Apparent possession - - - - 668
See BILL OF SALE. 1.

EXECUTION CREDITOR—Winding-up order 337
See COMPANY. 6.

EXECUTOR—*Bankers—Advances to an Executor—Executorial Purposes—Separate Account of Executor.*] One of two executors, who was himself a residuary legatee, entered an account with a banker in his own name for executorial purposes, and the

EXECUTOR—*continued.*
banker, with notice of the dispositions under the will, made advances to the executor for payments connected with the executorship, and securities were deposited for repayment of the advances. The co-executor assented to the first advance, but upon a second advance being made to the acting executor upon other securities, he withdrew his assent, and objected to the banker being repaid out of the trust property, on the ground that the money had been placed to the separate account of the acting executor. The advances were duly applied to the purposes of the administration. Upon an action being brought by the banker for a lien upon the second securities for repayment of his advances:—*Held*, that the banker was justified in advancing money to the acting executor for executorial purposes, and that the assent of the co-executor in the first instance was a further justification for placing confidence in the acting executor and in making further advances to him. The repayment was therefore decreed with mortgagee's costs. CHILD & CO. *v.* THORLEY - 151

2. —— *Retainer—Executor suing on behalf of himself and all other Creditors—Right to retain.*] In the administration of a testator's estate, the right of an executor to retain for his debt is not affected by the circumstances that he is himself the Plaintiff, suing on behalf of himself and all other the creditors, and that he has submitted to account in the ordinary form of an administration decree. *Ex parte* CAMPBELL. CAMPBELL *v.* CAMPBELL - - - - - - 198

3. —— *Retainer—Bequest to Bankrupt Debtor—Composition—Assignment by Debtor of Share of Estate.*] *D.*, who was indebted to his father, *L.*, on a bill of sale, and a promissory note, was adjudicated bankrupt. At a meeting of the creditors of *D.* a composition of 2*s.* 6*d.* in the pound was accepted in satisfaction of the debts due to them, and the bankruptcy was annulled. *L.*, who did not prove his debt, and was not paid the composition, died, having bequeathed to *D.* a share of his estate. The executors who proved the will (*D.* being an executor who did not prove) did not prove the debt under the composition. *D.* assigned his share of the estate to *B.*, who brought an action for the administration of *L.*'s estate. The executors claimed a right of retainer against *B.* for the debt:—*Held*, that the amount of composition was substituted for the provable debts, whether such debts were proved by the creditors or not; and that the executors were not entitled to the right of retainer against the bequest of the share of the estate for the whole debt, but only for the composition on the debt and interest; six years' arrears of interest on the promissory note, and the whole arrears on the bill of sale. *In re* ORPEN. BESWICK *v.* ORPEN - - 202

4. —— *Retainer—One Executor—Joint Creditors*—32 & 33 *Vict. c.* 46.] One of three executors who is also one of two joint creditors has a right of retainer in repsect of his joint debt. The right of retainer is not affected by the Act abolishing the distinction between specialty and simple contract debts. CROWDER *v.* STEWART. - - 368
—— Renunciation - - - - 3
See ADMINISTRATOR. 5.

EXONERATION OF MORTGAGED ESTATE 322
See Will. 2.

EXTENSION OF TIME—Disclaimer—Trustee in bankruptcy - - - - 613
See Bankruptcy. 8.

—— Indorsement on writ - - - - 734
See Practice. 22.

EXTRAORDINARY RESOLUTION - - 534
See Bankruptcy. 5.

FIDUCIARY RELATION—Solicitor—Improper sale - - - - - - 393
See Solicitor. 1.

FINAL JUDGMENT—Receiver appointed after
See Practice. 18. [544

FIXTURES—Mortgage - - - - 226
See Bankruptcy. 10.

FOREIGN ASSETS—Claim to foreign administration - - - - - - 407
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FORFEITURE—Building contract - - 522
See Building Contract.

—— Shares—*Ultrà vires* - - - - 681
See Company. 1.

FRAUD—Title of literary work—Fraud on public
See Specific Performance. [395

GARNISHEE ORDER—Right of holder to proceeds of mortgaged estate - - 378
See Judgment Creditor.

GENERAL BEQUEST—Power of appointment 648
See Power. 3.

GIFT AT THIRTY - - - - - - 47
See Will. 5.

GIFT AT TWENTY-ONE - - - - 44
See Will. 4.

GOODWILL—Bankruptcy - - - - 226
See Bankruptcy. 10.

GROWING CROPS—Bill of sale—Registration
See Bill of Sale. 2. [104

GUARANTEE—Construction - - - 290
See Principal and Surety.

HIGHWAY—Dedication - - - - 449
See Metropolis Management Act.

HUSBAND AND WIFE—*Married Infant—Consent—Waiver of Equity.*] A fund in Court belonging to an infant married woman will not be paid out to her husband, as she cannot waive her equity to a settlement. *In re D'Angibau* (15 Ch. D. 228) noticed. Shipway *v.* Ball - 376

—— Separate estate—Injunction against married woman - - - - - 371, 660
See Practice. 14.

INCOME—Application of—Purchase-moneys under Lands Clauses Act - - - 597
See Lands Clauses Act. 1.

—— Intermediate - - - - - - 691
See Power. 2.

INDEMNITY—Surety—Composition - 505
See Bankruptcy. 14.

—— Trustees—Leaseholds—Covenants - 723
See Trustee.

INDORSEMENT ON WRIT—Extension of time
See Practice. 22. [734

INFANT—*Compromise.*] An order having been made approving, on behalf of infant Defendants, a compromise which was objected to by their guardian and opposed by their counsel:—*Held*, that the Court had no jurisdiction to enforce a compromise against infants against the opinion of their advisers, and that the order must be discharged. *In re* Birchall. Wilson *v.* Birchall [C. A. 41

2. —— *Infants Custody Act*, 1873 (36 & 37 *Vict. c.* 12), *s.* 1—*Order for Custody of Infant "until further order"—Subsequent Application to vary—Appeal.*] When an order is made under sect. 1 of the *Infants Custody Act*, 1873, on the petition of a mother, giving the custody of an infant child to her "until further order," an application to vary the order by reason of something subsequent to its date should be made, not by way of appeal, but by motion before the Judge of first instance. Such a motion can be made by the Respondent to the original petition. The provision of sect. 1 of the Act, that the application shall be made by the mother by her next friend, applies only to the original petition. *In re* Holt - - - - C. A. 115

3. —— *Sale of Infant's Property—Discretion of Trustees—Large Increase of Income—Refusal of Court to order a Sale.*] Two trustees having power to sell the freehold property of an infant at the request of the guardians, and one trustee having declined upon such request to exercise the power of sale, the Court refused to control the discretion of the trustees by ordering them to sell the estate—there being no absolute necessity for raising money and the existing income being sufficient to keep down the charges upon the estate—notwithstanding that the effect of the sale would be to increase very considerably the income of the property. Marquis Camden *v.* Murray - - - - - 161

—— Maintenance - - - - 44, 47
See Will. 4, 5.

—— Married—Waiver of equity to settlement
See Husband and Wife. [376

INJUNCTION—Bankruptcy - - - 143
See Municipal Corporation.

—— Interim—Against parting with separate estate—Married woman - 371, 660
See Practice. 14.

INQUIRY—As to damages - - - - 81
See Practice. 9.

INSOLVENCY—Disqualification of alderman
See Municipal Corporation. [143

INSPECTION OF DOCUMENTS—Deceased lunatic
See Lunatic. [673

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See Company. 7, 8. [246

—— Marine—Total loss—Sale of ship - 474
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See Mortgage. 6.

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See Practice. 15.

—— Winding-up - - - - - 58
See Company. 9.

IRRELEVANCY—Affidavits on interlocutory motion - - - - - 594
See PRACTICE. 12.

JOINT AND SEPARATE DEBTS AND ASSETS
See BANKRUPTCY. 12. [513

JUDGMENT CREDITOR — *Garnishee Order — Mortgagor-Debtor of Judgment Debtor—Right of Holder of Garnishee Order against Proceeds of Sale of Mortgaged Estate—Rules of Court*, 1875, *Order* XLV., *rr.* 2, 3.] A judgment creditor who has obtained a garnishee order against a mortgage-debtor of his debtor, is not entitled to the surplus proceeds of the mortgaged estate, when sold by a prior mortgagee, under his power of sale—the sale having taken place after the date of the garnishee order.—But the holder of a garnishee order against the first mortgagee, such order having been obtained after the sale, is entitled to attach the surplus proceeds of sale in the hands of the first mortgagee. CHATTERTON *v.* WATNEY - - - - - 378
—— Opposition to resolution for liquidation 655
See BANKRUPTCY. 13.

JUDGMENT DEBTOR - - - 8
See PRACTICE. 13.

JURISDICTION—Bankruptcy - - 143
See MUNICIPAL CORPORATION.
—— Bankruptcy - - - 131, 484
See BANKRUPTCY. 4, 6.
—— Compromise by infant - - 41
See INFANT. 1.
—— Transfer of action - - - 702
See PRACTICE. 21.

LANDLORD AND TENANT—*Covenant not to Assign or Underlease without consent—Unreasonable Refusal — Qualification of Covenant.*] A lessee, in a lease of a house and premises to him for twenty-one years, covenanted with the lessor, his executors, &c., that he would not carry or suffer to be carried on any other business upon the premises than that of a grocer and tea-dealer without the previous consent in writing of the lessor, his executors, &c., and that he, his executors and permitted assigns, should not assign or underlease the premises without the like previous consent in writing, "but such consent not to be unreasonably withheld," and on the granting of such consent the lessee should pay a certain fee for the preparation of it, and give notice of any assignment to the lessor.—The premises were afterwards conveyed by the lessor, subject to the lease. The lessee applied for the necessary consent to enable him to mortgage the premises by way of underlease, and it was refused.—On demurrer to an action for an injunction, and for specific performance of the covenant, or for damages:—*Held*, that the words "but such consent not to be unreasonably withheld" did not amount to a contract on the part of the lessor, but were a qualification of the covenant by the lessee. *Treloar* v. *Bigge* (Law Rep. 9 Ex. 151) followed. SEAR *v.* HOUSE PROPERTY AND INVESTMENT SOCIETY - - - 387

2. —— *Ejectment—Notice to Quit—Disclaimer of Plaintiff's Title—"Customary Rent."*] In an action of ejectment it was proved that the Plaintiffs, who claimed to be landlords of certain tenements, had given notice to the Defendants, as their tenants, that the rent of the tenements would be raised, and that the Defendants had thereupon written a letter stating that they "disputed the Plaintiff's alleged right to raise the rent, but were willing and offered to pay what was due in respect of the customary rent of 11s. a year, being all that they were liable to pay in respect of the property":—*Held*, that this letter was a repudiation of the relation of landlord and tenant and an assertion of a right to hold the tenements upon payment of a customary rent in the sense of a quit rent, and that the Plaintiffs were entitled to eject, upon proving their title, without proving a valid notice to quit. VIVIAN *v.* MOAT - - - - - 730
—— Distress after bankruptcy - - 226, 274
See BANKRUPTCY. 9, 10.

LANDS CLAUSES ACT, 1845, *s.* 74—*Purchase-money—Lands subject to beneficial Leases taken by Railway Company—Tenant for Life and Remainderman—Purchase-money, Application of Income of—Form of Order.*] A railway company took freeholds settled by a will, and subject to eight leases, one granted by the testator and the other seven granted under powers in the will, either by the trustees or the tenant for life, and containing covenants by the lessee to repair or rebuild. The company purchased the leasehold interests from the tenants themselves, and paid the purchase moneys of the fee, subject to the lessees' interests, into Court under the *Lands Clauses Consolidation Act*, 1845. The income of the purchase-moneys when invested would be greater than the aggregate rents payable under the leases:—*Held*, upon petition by the tenant for life for investment and payment to him of the dividends, that, having regard to the 74th section of the *Lands Clauses Consolidation Act*, 1845, he was entitled, during the continuance of the leases, to so much only of the dividends as equalled the amount of the rents he would have received in case the property had not been taken by the railway company; that the rest of the rents must be accumulated; and that, upon the date of falling in of each lease, the tenant for life would be entitled to an additional annual sum representing the income of so much of the capital of the purchase-moneys as was attributable to the property comprised in the lease which had fallen in, and of the accumulations thereof, less the rent under such lease.—*In re Wootton's Estate* (Law Rep. 1 Eq. 589) followed.—Form of order. *In re* WILKES' ESTATE - - - - 597

2. —— *Railway Company, Taking of Lands by—Lands Clauses Consolidation Act*, 1845, *ss.* 7, 9—*Persons absolutely entitled, Sale by Trustees for—Trustee appointed Surveyor—Power of Sale, Determination of.*] A testator devised and bequeathed his residuary estate (which comprised freehold lands, in respect of which a notice to treat was given by a railway company before the death of the testator) to the use of trustees and their heirs in trust for his wife for life, and after her death to pay and assure the same unto his two married daughters, in equal shares, for their separate use as tenants in common, with a gift

LANDS CLAUSES ACT, 1845—*continued.*
over in favour of their respective issue in events which did not happen; "and for the purpose of division" he empowered his trustees to sell his residuary estate; and he declared that his trustees should be entitled to be paid for all business done by them in relation to his estate. The testator's wife, his two daughters and their husbands, all survived him; and after the death of the widow the trustees sold and conveyed the lands to a railway company for a price which had been determined by the valuation of two surveyors, as provided by the 9th section of the *Lands Clauses Consolidation Act*, 1845; the trustees having first, for the purpose of making such valuation, appointed one of themselves as the surveyor on their behalf. One of the testator's daughters disputed the validity of the sale, and brought an action to restrain the company from taking or using the lands:—*Held*, first, that under the 7th section of the *Lands Clauses Consolidation Act*, 1845, both trustees for *femes covertes* entitled for their separate use, and also such *femes covertes* themselves, are persons competent to contract with a railway company for the sale of lands; but that a railway company with notice that a *feme coverte* so entitled objected to a sale by her trustees, and was willing herself to contract, could not safely take a title from the trustees only.—Secondly. That the appointment by trustees of one of themselves as the surveyor to make on their behalf the valuation required by the 9th section of the *Lands Clauses Consolidation Act*, 1845, is sufficient to invalidate a sale under the Act.—Thirdly. That trustees cannot sell under the Act at a price to be determined by valuation, but must first fix the price by agreement, and then ascertain its sufficiency by valuation.—Fourthly. That the power of sale given to the trustees by the will determined upon the death of the testator's widow, because the *femes covertes* then became absolutely entitled for their separate use, and the property was "at home." PETERS *v.* LEWES AND EAST GRINSTEAD RAILWAY COMPANY - - - - - 703

LEASE—Disclaimer—Trustee in bankruptcy 613
See BANKRUPTCY. 8.

—— Land subject to—Purchase-money—Application of income - - - 597
See LANDS CLAUSES ACT. 1.

LEAVE TO AMEND — Application at trial — Appeal - - - - 663
See PRACTICE. 4.

LEAVE TO APPEAL—Person not a party - 1
See PRACTICE. 3.

LEGACY—Infant—Maintenance - 44, 47
See WILL. 4, 5.

LIEN—Engineer — Ship — Payment by bill of exchange - - - - 604
See SHIP. 1.

—— Receiver—Bankruptcy - - - 497
See BANKRUPTCY. 20.

—— Solicitor—Costs - - - - 617
See SOLICITOR. 2.

LIFE INSURANCE—Company - 83, 246
See COMPANY. 7, 8.

LIGHT—*Vendor and Purchaser — Easements — Dominant and Servient Tenement—Purchase by different Persons from same Vendor—Contemporaneous Conveyances — Injunction.*] Where the owner of a dwelling-house and adjoining land sells the house to one person and the land to another under contemporaneous conveyances, either purchaser being aware of the conveyance to the other, the purchaser of the land is not entitled to build thereon so as to obstruct the lights of the house.—A testator being owner in fee of a piece of land with two dwelling-houses thereon, and of another piece of land immediately adjoining, with a warehouse at the further end thereof, devised his real estate to his two sons and another person in trust for sale, giving his two sons, or either of them, an option of purchasing any part of his real estate. By two separate but contemporaneous conveyances, executed by the trustees of the will, the one piece of land and the two dwelling-houses thereon were conveyed for value, "together with all lights thereunto belonging," and all the estate, &c., to the one son in fee, and the other adjoining piece of land and the warehouse were conveyed for value, together with all lights, &c., and all the estate, &c., to the other son in fee:—An injunction was granted restraining the successor in title to the purchaser of the last-mentioned piece of land and warehouse from building on his land in such a way as to obstruct his neighbour's lights.—*Wheeldon v. Burrows* (12 Ch. D. 31) considered. ALLEN *v.* TAYLOR - - - - - 355

LIQUIDATION - - 505, 513, 623, 655
See Cases under BANKRUPTCY. 12—15.

LITERARY WORK—Title of—Fraud on public
See SPECIFIC PERFORMANCE. [395

LOCKE KING'S ACT - - - - 322
See WILL. 2.

LOCUS STANDI—Appeal in bankruptcy - 110
See BANKRUPTCY. 11.

LUNATIC—*Practice—Order to inspect Documents by a Person claiming under a Deceased Lunatic.*] A lunatic having died intestate, and an action having been commenced for recovery of his real estate:—*Held*, that the Defendant, who produced *primâ facie* evidence of his being heir-at-law of the lunatic, was entitled to an order to inspect the documents relating to the estate which were in the custody of the Registrars in Lunacy, although it was sworn on the other side, and not contradicted, that the lands had descended to the lunatic from his mother, and that the Defendant was no relation to the mother. *In re* SMYTH (A LUNATIC) - - - - C. A. 673

—— Trustee - - - - 503, 672
See TRUSTEE ACT. 1, 2.

MAINTENANCE - - - 44, 47
See WILL. 4, 5.

MARRIAGE SETTLEMENT—Covenant to settle future property - - - 207
See SETTLEMENT.

MARRIED WOMAN—Equity to settlement—Infant - - - - - 376
See HUSBAND AND WIFE.

—— Injunction against parting with separate estate - - - 371, 660
See PRACTICE. 14.

MARRIED WOMAN—*continued.*
—— Sale in partition action—Request for sale *See* PARTITION SUIT. 2. [362
MASTER OF SHIP—Authority to sell - 574 *See* SHIP. 2.
MEASURE OF DAMAGES—Guarantee - 290 *See* PRINCIPAL AND SURETY.
—— Improper sale by solicitor - - 393 *See* SOLICITOR. 1.

METROPOLIS MANAGEMENT ACT, 1855 (18 & 19 *Vict. c.* 120), *s.* 88—*Dedication to Public—Highway — Thoroughfare — Urinal — Nuisance—Vestry.*] A court which was not a thoroughfare had for seventy or eighty years been at all hours open to the public, and had been paved, lighted, and cleansed by the parish vestry, and the owners of the soil were not shewn to have during that time exercised any rights of ownership over the soil of the court:—*Held*, by *Malins*, V.C., that the court had been dedicated to the public so as to bring it under the vestry according to the *Metropolis Local Management Act.*—Under the *Metropolis Local Management Act* (18 & 19 Vict. c. 120), s. 88, the vestry has power to provide and maintain urinals in situations where they deem such accommodation to be required:—*Held*, by *Malins*, V.C., that any question whether one place or another was more fit for the erection of an urinal must be left to the decision of the vestry; but that the vestry would be controlled by the Court if they acted in an unreasonable manner and occasioned a nuisance to the owners of adjoining property.—*Held*, by the Court of Appeal, that as the erection of an urinal was not necessarily a nuisance, the provision of the Act authorizing the vestry to erect urinals did not empower them to erect one where it would be a nuisance to the owners of adjoining property, there being no words in the Act which expressly or by necessary implication authorized them to create a nuisance. VERNON *v.* VESTRY OF ST. JAMES, WESTMINSTER - - - - 449

MIXED FUND—Exoneration - - 322 *See* WILL. 2.

MORTGAGE—*Consolidation—One Mortgage ceasing to exist—Mortgage in the Name of Trustees.*] Two persons partners in a mercantile firm, who hold a leasehold house, made an equitable mortgage of it to *W.* Afterwards the firm took in another partner who acquired a share in the equity of redemption. The firm then mortgaged their interest in another house, which they held as joint tenants, to *W.* for a further debt. The firm having become bankrupt, the lease on the first mentioned house was determined by the bankruptcy, and the lessor re-entered. *W.* claimed to consolidate both debts, so that the second-mentioned house should not be redeemed without paying both debts:—*Held*, that one mortgaged property having ceased to exist, there could be no consolidation of the two debts.—Whether a mortgage by three persons can be consolidated with a mortgage by two in trust for the three, *quære*. *In re* RAGGETT. *Ex parte* WILLIAMS [C. A. 117

2. —— *Contemporaneous Mortgage — Mortgage of Freeholds — Contemporaneous Security of Leaseholds for Mortgage Debt—"Collateral"*

MORTGAGE—*continued.*

Security—Incidence of Mortgage Debt.] A mortgagor conveyed freeholds by way of mortgage by an indenture which recited an agreement by the mortgagees to advance him the principal moneys upon having the repayment thereof with interest secured "as hereinafter mentioned and by a collateral security or indenture intended to bear even date with" those presents.—On the same day the mortgagor demised leaseholds by way of mortgage to the same mortgagees to secure the same advance by an indenture which recited the mortgage of the freeholds, and that on the treaty for the advance "it was agreed that the same principal and interest should be further secured by these presents."—Each of the two indentures contained a covenant for the payment of the mortgage debt and interest.—In an action to administer the estate of the mortgagor:—*Held* (affirming the decision of *Hall*, V.C.), both on the frame of the deeds themselves, and upon the evidence as to the circumstances attending the advance, that the leasehold security was not "collateral" in the sense of "secondary"; and accordingly that, as between the real and personal representatives of the martgagor, the mortgage debt was payable rateably out of the freeholds and leaseholds comprised in the two securities, and not primarily out of the freeholds.—Observations upon *Marquis of Bute* v. *Cunynghame* (2 Russ. 275) and upon the meaning of the words "collateral security." *In re* ATHILL. ATHILL *v.* ATHILL - C. A. 211

3. —— *Contemporaneous Mortgages—Incidence of Mortgage Debt — Apportionment — Collateral Security.*] A mortgagor deposited title deeds with an insurance company for securing the repayment of an advance of £1200. About the same time he executed an assignment of policies of insurance to secure the repayment of a similar sum. Only one sum of £1200 was really advanced:—*Held*, that the security on the land and on the policies must bear the mortgage debt rateably. EARLY *v.* EARLY. WILLIAMS *v.* EARLY 214, n.

4. —— *Equitable Mortgage — Transferee — Confidential Solicitor—Constructive Notice.*] *A.* deposited deeds with his confidential solicitor with a memorandum of deposit by way of equitable mortgage to secure the repayment of £3000. The solicitor handed the deeds and memorandum to *B.* as security for £2000, together with a memorandum signed by himself that the £2000, part of the annexed £3000 security, then belonged to *B.*, with interest at 5 per cent. The solicitor afterwards obtained a return of the deeds from *B.* upon an insurance that in lieu thereof others of equal value should be deposited. Other deeds were subsequently deposited, which proved to be worthless. The mortgage of £3000 was paid off by *A.'s* representatives, and the genuine deeds were given up to them by the solicitor without the memorandum of deposit. No notice of *B.'s* security had been given to *A.* *B.* then claimed payment of the £2000 against the estate of *A.*, upon the ground of constructive notice to *A.* through his confidential solicitor:—*Held*, that *B.*, by neglecting to give notice to *A.* of the transfer of the mortgage, and by giving up the documents

MORTGAGE—*continued.*

originally deposited with him, had lost any right he might have had against *A.'s* estate. *In re* Lord Southampton's Estate. Allen *v.* Lord Southampton. Banfather's Claim - 178

5. —— *Officer's Commission—Charge—Notice—Priority—Regulation of the Forces Act*, 1871 (34 & 35 *Vict. c.* 86), *s.* 3.] When an officer retires from Her Majesty's service, the amount in respect of his commission to which he is entitled under 34 & 35 Vict. c. 86, s. 3, "upon his retirement," though it has been previously lodged by the Army Purchase Commissioners with the army agents, and by them entered in their books under the officer's name, is not the money of the officer so as to be capable of being affected by notice from an incumbrancer to the army agents until the retirement is gazetted.—A first incumbrancer gave notice after the money was transferred by the Army Purchase Commissioners to the agents and again gave notice five days after the *Gazette*. Second and third incumbrancers gave simultaneous notices on the day after the *Gazette*: —*Held*, that the order of priorities was: 1. Second incumbrancer; 2. Third incumbrancer; 3. First incumbrancer. Johnstone *v.* Cox 571

6. —— *Proviso for Reduction of Interest—Mortgagee in Possession — Accounts — Right to Higher Rate of Interest.*] Under a proviso in a mortgage deed for reduction of interest on punctual payment, a mortgagee in possession through the default of the mortgagor is entitled, on the accounts being taken, to charge the mortgagor with the higher rate of interest; and, also, in a proper case, with the commission paid to a receiver for collecting the rents.—*Stains* v. *Banks* (9 Jur. (N.S.) 1049; reversed on appeal, Reg. Lib. 7 B. 1863, 1761) considered. Union Bank of London *v.* Ingram - - - - 53

—— Attornment clause - - - 274
See Bankruptcy. 9.

—— Company — Statement of consideration — Stamp - - - - 411
See Company. 5.

—— Debenture—Priority - - - 66
See Company. 3.

—— Power of sale—Garnishee order—Proceeds of sale - - - - 378
See Judgment Creditor.

—— Salvage—Money expended by second mortgagee - - - 411
See Company. 5.

—— Title deeds—Solicitor's lien on - 617
See Solicitor. 2.

MORTGAGEE IN POSSESSION - - 53
See Mortgage. 6.

MORTMAIN - - - - - 173
See Charity.

MUNICIPAL CORPORATION—*Alderman—Disqualification—Insolvency—Composition with Creditors—Avoiding Office—Municipal Corporation Act*, 1835 (5 *&* 6 *Will.* 4, *c.* 76), *s.* 52—*Debtors Act*, 1869, *s.* 21—*Jurisdiction—Injunction—Assigned Business — Judicature Act*, 1873, *s.* 25, *sub-s.* 8; *s.* 34.] The Plaintiff, an alderman of a borough, made a composition with his creditors, but executed no composition deed; nor were any

MUNICIPAL CORPORATION—*continued.*

composition proceedings taken under the *Debtors Act*, 1869. He had, however, executed a bill of sale, duly registered, to a person not a creditor, to secure a sum of money advanced by him to meet the amount of the composition. A meeting of the corporation of the borough having been summoned by notice for the purpose of declaring the office held by the Plaintiff void under the *Municipal Corporation Act*, 1835 (5 & 6 Will. 4, c. 76), s. 52, and the *Debtors Act*, 1869, s. 21, and electing a successor:—An injunction was granted, at the instance of the Plaintiff, restraining the corporation from proceeding under their notice on the ground, (1) that, having regard to the express words of the above sections, the Plaintiff had not become disqualified from holding office; (2) that under sect. 25, sub-s. 8, of the *Judicature Act*, 1873, the Court had jurisdiction to grant the injunction; and (3) that, having regard to sect. 34 of the same Act, the action, which claimed the injunction only, had been properly brought in the Chancery Division. —The jurisdiction of the Chancery Division to interfere by injunction under *Judicature Act*, 1873, s. 25, sub-s. 8, considered. Aslatt *v.* Corporation of Southampton - - - 143

MUTUAL LIFE INSURANCE COMPANY—Winding-up - - - 83, 246
See Company. 7, 8.

NET PROFITS—Payment of dividend of company
See Company. 4. [344

NOTICE — Charge on officer's commission money
See Mortgage. 5. [571

—— Charge on shares of next of kin - 577
See Administrator. 1.

—— Cross notice of appeal - - - 270
See Practice. 2.

—— Equitable mortgage—Solicitor—Priority
See Mortgage. 4. [178

—— To quit—Disclaimer of lessors's title 730
See Landlord and Tenant. 2.

—— To third party - - - - 489
See Practice. 20.

NUISANCE—Urinal - - - 449
See Metropolis Management Act.

OBJECTION—For want of parties - - 59
See Practice. 16.

OPENING BIDDINGS—Sale by Court - 561
See Practice. 19.

OPTION OF PURCHASE—Power of administrator
See Administrator. 4. [236

PARTIAL INVALIDITY—Appointment - 691
See Power. 2.

PARTICIPATION IN PROFITS—Policy-holders
See Company. 7. [83

PARTICULARS OF DEMAND - - 13
See Practice. 17.

PARTIES—Objection for want of - - 59
See Practice. 16.

—— Partition action—Sale - - 360
See Partition Suit. 1.

PARTITION SUIT—*Practice—Order for Sale—Absent Parties—Dispensing with Service of Judgment—Partition Act*, 1876 (39 & 40 *Vict. c.* 17), *s.* 3—*Form of Judgment.*] In a partition action, the Court, in ordering a sale at the request of the parties to the action, will not, in the absence of the other parties interested, preface the judgment order for sale with an expression of its opinion that a sale is more beneficial than a partition.—Form of judgment order for sale in a partition action providing that service of the judgment may be dispensed with under sect. 3 of the *Partition Act*, 1876. *In re* HARDIMAN. PRAGNELL *v.* BATTEN - - - - 360

2. —— *Practice—Married Woman—Request for Sale—Authority to act on her behalf—Request by Counsel—Purchase-money—Conversion—Fund under £200—Election—Separate Examination—Partition Act*, 1876 (39 & 40 *Vict. c.* 17), *s.* 6.] In a partition action, an order for sale of a married woman's share of real estate when made with her consent or at her request under sect. 6 of the *Partition Act*, 1876, operates as a conversion of such share into personal estate.—In a partition action a request for sale on the part of a married woman, under sect. 6 of the *Partition Act*, 1876, should be made by a person specially authorized to act on her behalf in the action: a request by her counsel is not sufficient. —*Crookes* v. *Whitworth* (10 Ch. D. 289) not followed.—Where, in a partition action, the share of a married woman in the proceeds of sale of real estate is under £200, the Court will order the same to be paid out to her upon her separate receipt and upon an affidavit of no settlement, and will dispense with her separate examination as to her election to take the money as personal estate. —*In re Shaw* (49 L. J. (Ch.) 213) not followed. WALLACE *v.* GREENWOOD - - - 362

PARTNERSHIP—Participation in profits—Policy holders - - - - - 83
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—— Proof by partner in bankruptcy - 620
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See PRACTICE. 16.

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—— For winding up—Policy-holders - 246
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PLEADINGS—Amendment of - - 440
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See PRACTICE. 1.

POLICY-HOLDERS—Mutual life assurance company—Liabilities to debts - - 246
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POLICY-HOLDERS—*continued.*

—— Participating in profits - - - 83
See COMPANY. 7.

POSSESSION—Engineer—Ship - - 604
See SHIP. 1.

POSTPONED ENJOYMENT - - - 691
See POWER. 2.

POWER — *Testamentary Appointment—Death of Appointee before Testatrix—Real Estate.*] A testator gave to his mother a general testamentary power of appointment over real estate, provided that, should his mother die without any will, then the estate was to go to *E. C.* The mother by will gave all her real estate, including that over which she had any power of appointment, to trustees in trust for *G. G.*, who died in her lifetime:—*Held*, by *Malins*, V.C., that, the property being real estate, the case was not governed by authorities having reference solely to personal property; that the mere circumstance of the testatrix making an appointment which failed did not shew an intention to make the appointed estate part of her general property, and that the estate went as in default of appointment.—*Held*, on appeal, that for this purpose there was no distinction between real and personal estate, and that the property belonged to the trustees of the mother's will, subject to a resulting trust for her heir-at-law (if any). *In re* VAN HAGAN. SPERLING *v.* ROCHFORT [C. A. 18

2. —— *Testamentary Appointment—Settlement —Will — Partial Invalidity — Appointment of Share of Trust Fund—Contingent Interest—Postponed Enjoyment of Capital—Intermediate Income.*] Where a testator, having a power of appointment over personalty, appoints a share of the fund to an object of the power upon the happening of a certain event, the appointment carries with it all the intermediate accretions to that share, whether in the shape of income or otherwise.—Under a settlement made on the second marriage of *M.*, a widow, a trust fund belonging to her was vested in a trustee upon trust for her three children, *nominatim*, in such shares as she should by deed or will appoint, and in default of appointment, for such three children equally.—By her will *M.* appointed that the trustee of the settlement should stand possessed of the trust fund, as to one-third part thereof, upon trust to pay the income thereof to her son *C.* (an object of the power) during his life, or until anticipation; and from and after his death or the determination of his estate, upon trust to pay the said one-third part to her grandson (not an object of the power) when he should attain twenty-one; and in case he should die before he should attain twenty-one, upon trust to pay the said one-third part to her daughter *S.* (an object of the power).—*C.* survived the testatrix and died, the grandson being then an infant:—*Held*, that, although the appointment to the grandson was void, the appointment over to *S.* was good, and that the income from *C.'s* death of the one-third so appointed would pass with the capital to *S.*, if the grandson died under twenty-one; but that, if that event did not happen, both income and capital would pass under the settlement as in default of appointment. LONG *v.* OVENDEN - - - - - - 691

POWER—*continued.*

3. —— *Testamentary Appointment—Settlement—Real Estate—General Power of Appointment—Power of Sale—Direction to lay out Money in Purchase of Land — Conversion — Reinvestment in Government Funds—Will—General Bequest of Personal Estate—Exercise of Power of Appointment—Wills Act*, 1837 (1 *Vict. c.* 26), *ss.* 1, 27.] By *A.'s* marriage settlement, dated in 1832, her father settled certain real estate to the use of *A.* for life, and after her death, and in default of issue of the marriage, to the use of such persons as she should by will appoint, and in default of appointment to the use of the person under whom the Plaintiff claimed. The settlement contained a power for the trustee to sell the real estate, with a direction to lay out the proceeds with *A.'s* consent, in the purchase of other hereditaments to be settled to the like uses, with a power of interim investment, with the like consent, in Government securities.—By his will, dated in 1831, and confirmed, subject to the settlement, by a codicil executed shortly after the settlement, *A.'s* father devised the property, subject to the settlement, and all other his real estate, to the use of *A.* for life, and in default of her having any issue, to such uses as she should by will appoint. —Some years afterwards, *A.'s* father and husband both having died, and there having been no issue of the marriage, the trustees of the settlement, at *A.'s* request, sold all the settled real estate for a sum of £24,226 2*s.* 0*d.* consols, which they transferred to her.—*A.* died a widow in 1879, having by her will, made shortly after the transfer to her of the consols, after appointing executors and bequeathing pecuniary legacies amounting to upwards of £30,000, bequeathed "all the residue of my personal estate and effects whatsoever" to two persons absolutely. The personal estate to which *A.* was entitled at the date of her will and of her death, independently of the consols, did not amount to more than £6000:—*Held* (affirming the decision of *Jessel*, M.R.), that the general devise of personal estate contained in *A.'s* will operated as an execution of the powers of appointment over the real estate given to her by her marriage settlement and by her father's will, and passed the consols. CHANDLER *v.* POCOCK **C. A. 648**

—— Of sale—Administrator - - **3, 49**
See ADMINISTRATOR. 2, 5.

—— Of sale—Determination of—Separate estate
See LANDS CLAUSES ACT. 2. **[703**

—— Of sale—Mortgage—Garnishee order—Proceeds of sale - - - **378**
See JUDGMENT CREDITOR.

—— To mortgage—Administrator - - **577**
See ADMINISTRATOR. 1.

PRACTICE—*Amendment of Title of Action and of Pleadings — Assignment of Cause of Action — Rules of Court*, 1875, *Order XVI., r.* 13.] A trustee in bankruptcy commenced an action to obtain a declaration that a deed, which purported to be an absolute conveyance of real estate by the bankrupt, was in fact a mortgage, and to redeem such mortgage; and subsequently sold and assigned his interest in the subject-matter of the action to *C.*, who claimed to carry on the action in the name of the original Plaintiff:—*Held*, on

PRACTICE—*continued.*

the application of the Defendant, that *C.* was bound to amend the title of the action so as to shew that he was the real Plaintiff, and to introduce such averments in the statement of claim as would disclose his title. SEEAR *v.* LAWSON **[C. A. 121**

2. —— *Appeal—Cross Notice—Notice by Respondent to ask for Variation—Rules of Court*, 1875, *Order LVIII., r.* 6.] A respondent who seeks to have an order varied on a point in which the appellant has no interest, cannot proceed by notice under Rules of Court, 1875, Order LVIII., rule 6, but must give a notice of appeal. *In re* CAVANDER'S TRUSTS - - - **C. A. 270**

3. —— *Appeal—Leave to Person not a Party to appeal.*] Leave to a person interested in, but not a party to an action, to appeal from an order, may be obtained by *ex parte* application to the Court of Appeal. *In re* MARKHAM. MARKHAM *v.* MARKHAM - - - - **C. A. 1**

4. —— *Appeal—Time for Appealing—Refusal of Application at Trial for Leave to amend Pleadings—Rules of Court*, 1875, *Order LVIII., r.* 15.] When at the trial of an action an application for leave to amend the pleadings is refused, the refusal forms part of the judgment, and it is unnecessary to appeal separately from it; but on an appeal from the judgment the Court of Appeal has power, if it thinks fit, to give leave to amend. It is contrary to the practice to insert in the judgment as drawn up any mention of the refusal of leave to amend. LAIRD *v.* BRIGGS **C. A. 663**

5. —— *Appeal—Time for Appealing—Refusal of Application—Rules of Court*, 1875, *Order LVII., r.* 8 (*April*, 1880), *LVIII., r.* 15.] When an order refusing an application contains a declaration or expression of opinion of the Judge as to the rights of the parties, it is not a mere refusal of the application so as to oblige an appeal to be brought within twenty-one days from the date of the refusal under Order LVIII., rule 15. *In re* CLAY AND TETLEY - - - - **3**

6. —— *Costs of Abandoned Appeal.*] On the 20th of December, 1880, *C.* gave notice of appeal, but did not set it down. On the 11th of January he sent a letter withdrawing his notice of appeal. On the next day the solicitor for the Respondents wrote to *C.* saying that he had delivered briefs, and that unless *C.* would undertake to pay the Respondents' costs of the appeal the usual proceedings would be taken to enforce payment of them. *C.* did not answer this letter. The Respondents then moved that the appeal might be dismissed, and that *C.* might be ordered to pay the costs of the appeal and of this application, and an order was made accordingly. CHARLTON *v.* CHARLTON - - - - **C. A. 273**

7. —— *Costs—Abandoned Motion—Discontinuance of Action—Taxation—Incomplete—Affidavits or Pleadings.*] Statement of practice as to taxation of costs of an abandoned motion, or on discontinuance of action. HARRISON *v.* LEUTNER. **[559**

8. —— *Costs—"Affidavit of Increase."*] Upon summons to review the taxation of costs, the Court refused to direct the Taxing Master to adopt the practice in the Queen's Bench Division

PRACTICE—*continued.*

of requiring the solicitor to make an "affidavit of increase," since evidence could be obtained without such affidavit of all matters necessary for the information of the Taxing Master. But the Court declined to lay down any rule that such affidavit of increase should in no case be required. SMITH *v.* DAY - - - - - 726

9. —— *Costs—Inquiry as to Damages.*] When an injunction is granted to restrain the committing of a nuisance, and an inquiry as to damages is directed in Chambers, though the Plaintiff is entitled to the general costs of the action, the costs of the inquiry will be reserved in order that the Judge may have complete control over them, and be able to see that they are not unreasonably exaggerated. SLACK *v.* MIDLAND RAILWAY COMPANY - - - - - - 81

10. —— *Costs—Production and Inspection of Documents—Counsel's Fees and Refreshers.*] When an order is made in an action in the Chancery Division for the production of documents at the office of the producing party's solicitor, that party, if ultimately successful in the action, is not entitled, as between party and party, to his solicitor's costs of the production, nor to his own costs of inspecting the documents of the other party.—When the trial of an action commences on one day and is concluded on the next day, refreshers to counsel will not be allowed unless the trial occupied in the whole more than one day's sittings, *i.e.*, six hours.—The Taxing Master's decision as to the amount of counsel's fees will not be interfered with unless a gross mistake is made. BROWN *v.* SEWELL - - C. A. 517

11. —— *Evidence—Agreement to take Evidence by Affidavit—Examination of Witnesses de bene esse—Rules of Court*, 1875, *Order* XXXVII., *r.* 4; *Order* XXXVIII.] Where the parties to an action agree under Order XXXVIII. to take the evidence in the action by affidavit, and either party subsequently finds himself unable to procure affidavit evidence either by reason of the reluctance of some of his witnesses to make affidavits or other good cause, his proper course is to take out a summons for leave to be relieved from the agreement, and the Court will, in a proper case, make an order that the reluctant witnesses be examined *vivâ voce* at the trial, or, at the option of the other party, discharge the agreement and direct all the evidence to be taken *vivâ voce* at the trial. —Whenever a necessary witness is going abroad, or is from illness, age, or other infirmity likely to be unable to attend the trial, an order will be made under Order XXXVII., rule 4, for his examination before an officer of the Court in the presence of both parties.—A like order will be made whenever it shall appear to the Court necessary for the purposes of justice. WARNER *v.* MOSSES [C. A. 100

12. —— *Evidence—Affidavits in Reply—Rules of Court*, 1875, *Order* XXXVIII., *r.* 3—*Cons. Ord.* XXXIII., *r.* 7.] Affidavits filed by a Plaintiff in reply will not upon interlocutory motion be ordered to be taken off the file upon an allegation by the Defendant that they are not confined to matters strictly in reply; though at the hearing, if it should turn out to be so, the Court will not regard them, or may give leave to the Defendant to answer them. GILBERT *v.* COMEDY OPERA COMPANY - - - - - 594

13. —— *Garnishee Order—Examination of Judgment Debtor—Rules of Court*, 1875, *Order* XLV., *r.* 1.] The examination of a judgment debtor under Rules of Court, 1875, Order XLV., rule 1, touching the debts due to him is intended to be a cross-examination of the strictest character, and the debtor when under such an examination is bound to answer all questions relevant to the subject-matter, and cannot insist on the examination being confined to the simple question "whether any and what debts are due to him." REPUBLIC OF COSTA RICA *v.* STROUSBERG C. A. 8

14. —— *Injunction—Married Woman—Separate Estate — General Engagements — Action by Creditor — Injunction to restrain Dealing with Separate Estate—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.] In an action by a creditor to enforce against the separate estate of a married woman a general engagement entered into with her on the credit of that estate, the Court will not, before the creditor has established his right by obtaining a judgment, restrain the married woman from dealing with her separate estate. — Decision of *Malins*, V.C., reversed. ROBINSON *v.* PICKERING - - C. A. 371, 660

15. —— *Interrogatories—Discovery—Accounts —Rules of Court*, 1875, *Order* XXXI.] In an action to restrain the Defendants from using a trade-name and from selling their goods as the goods of the Plaintiffs, the Defendants by counterclaim claimed the like relief, and also an account of the goods sold by the Plaintiffs as and for the goods of the Defendants, and of the profits of such sale. Both Plaintiffs and Defendants claimed to derive their title under a partnership that had been dissolved in 1861, and both had since that time carried on the same business. An interrogatory exhibited by the Defendants required the Plaintiffs to set forth the quantities of goods sold by them since 1861, distinguishing the quantities sold in each year:—*Held* (affirming the decision of *Bacon*, V.C.), that the interrogatory was not for the ordinary purposes of discovery, but was directed to the details of the Plaintiff's evidence, and was rightly disallowed. —*Saunders* v. *Jones* (7 Ch. D. 435) explained and discussed. BENBOW *v.* LOW - - C. A. 93

16. —— *Objection for want of Parties—Rules of Court*, 1875, *Order* XVI., *rr.* 13, 14, 17—*Co-owners of a Patent—Right of one Co-owner to sue.*] One of several co-owners of a patent has a right to sue alone for the recovery of profits due for the use of the patent.—An objection by a Defendant that other persons should have been joined as Plaintiffs should be made promptly, under Rules of Court, 1875, Order XVI., rules 13 and 14, and may not be postponed till the hearing where no impediment exists to raising the objection at once. SHEEHAN *v.* GREAT EASTERN RAILWAY COMPANY - - - - - 59

17. —— *Particulars of Demand.*] The administratrix of *A.*, by statement of claim in an action against the administratrix of *G.*, alleged

PRACTICE—*continued.*

that an arrangement had been made between *A.* and *G.* that sums contributed by them for the purpose of being lent to or applied for the benefit of *C.*, to enable him to carry on a litigation, should be treated as a joint transaction, and that as soon as *C.* had established his title to the property for which he was suing, and could repay the advances made him, the advances made by *A.* and *G.* should be repaid out of the moneys recovered from him; that during the litigation *A.* advanced, in pursuance of this arrangement, sums amounting to about £27,000; that the advances made to *C.* were made through *G.* and in his name; that the Defendant had recovered a judgment against *C.* for the advances to him, and that a sum had been set apart in a suit in Chancery in satisfaction of this judgment. The Plaintiff claimed that it might be declared that the loans by *G.*, in respect of which the judgment was recovered, were transactions for the joint benefit of *A.* and *G.* as partners, and to have the sums contributed by them respectively ascertained; and asked that the Plaintiff might be declared entitled to a share in the benefit of the judgment, and in the fund set aside to satisfy it. The Defendant, before putting in a defence, applied for an account, with dates and items of the particulars of the £27,000 mentioned in the statement of claim, and *Pollock*, B., made an order accordingly:—*Held*, on appeal, that the action not being a mere legal demand for an ascertained sum, but an equitable claim for an amount to be ascertained by an account, the particulars asked for were not required to enable the Defendant to frame her defence, and that the Plaintiff ought not to be ordered to furnish them. Augustinus *v.* Nerinckx - - - - **C. A. 13**

18. —— *Receiver—Motion for—Appointing Receiver after Final Judgment—Whether New Action necessary—"Cause or Matter pending"—Judicature Act*, 1873, *s.* 24—*Rules of Court*, 1875, *Order* xlii.—*Bankruptcy—Execution Creditor—Equitable Execution—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 95, *sub-s.* 2; *s.* 125, *sub-s.* 5.] *Held*, by the Master of the Rolls, that so long as the final judgment in an action remains unsatisfied, the action is a "cause or matter pending" within the meaning of sect. 24, sub-sect. 7, of the *Judicature Act*, 1873, and that consequently, in an action by a creditor against a debtor in which the Plaintiff has obtained final judgment, the Court has power, under that sub-section, in order to satisfy the judgment, to grant equitable execution against the Defendant by appointing a receiver upon motion in that action, although the writ may not have been indorsed with a claim for a receiver; it being unnecessary in such case to bring another action for the purpose.—*S.* recovered judgment for a debt against *C.* and issued an *elegit*. The sheriff returned that the debtor had no lands which he could seize. *C.* had leasehold property which was subject to mortgages. *S.* thereupon obtained the appointment of a receiver of the rents of the leasehold property without prejudice to the rights of the prior incumbrancers. On the same day a petition for adjudication in bankruptcy was filed against *C.*, and a receiver was appointed in bankruptcy a few minutes before the appointment of the receiver in the action. *C.* afterwards filed a petition for liquidation; the same receiver was appointed in the liquidation as had been appointed in the bankruptcy, and resolutions were passed for liquidation of his affairs by arrangement. *S.* had not, until some days after the appointment of his receiver, any notice that *C.* had committed an act of bankruptcy, or that any proceedings in bankruptcy were pending against him:—*Held*, by the Master of the Rolls and by the Court of Appeal, that as, at the time when *S.* obtained equitable execution by the appointment of a receiver, the property was legally though not actually in the possession of the receiver appointed by the Court of Bankruptcy, the equitable execution was ineffectual, and was not protected by sect. 95, sub-sect. 2, of the *Bankruptcy Act*, 1869. Salt *v.* Cooper - - - - **C. A. 544**

19. —— *Sale by the Court*—30 & 31 *Vict. c.* 48, *s.* 7—*Opening Biddings—Principle applicable to Private Contract.*] In an administration suit an estate was ordered to be sold by auction, but the reserved price not having been reached, the sale by auction became inoperative. A subsequent offer to purchase subject to the approval of the Court within ten days was carried in before the Chief Clerk, who approved of the offer, and ordered the contract to be carried out, whereupon the deposit was paid and the abstract delivered. Before the order had been passed and entered a much higher price was offered.—Upon summons to vary the Chief Clerk's certificate by setting aside the sale and directing the offer for a larger amount to be accepted:—*Held*, that the certificate of the Chief Clerk, although not passed and entered, was tantamount to a confirmation of the contract; and that the principle of the Act 30 & 31 Vict. c. 48, s. 7, by which the old practice of opening biddings on a sale by auction was discontinued, except upon the ground of fraud or improper conduct, applied equally to a sale by private contract entered into under the sanction of the Court, and that such a contract could not be discharged where no unfairness existed. The Chief Clerk's certificate was therefore confirmed. *In re* Bartlett. Newman *v.* Hook - **561**

20. —— *Third Party Notice—Ex parte Application—Discretion of Court—Rules of Court*, 1875, *Order* xvi., *rr.* 18, 20, 21.] An application by the Defendant in an action for leave to serve a third party notice under Order xvi., rule 18, ought to be made on notice to the Plaintiff, and not *ex parte*.—In an action by a company against its directors and others, seeking to make the Defendants personally liable in respect of certain dividends alleged to have been improperly paid out of capital, the Defendants applied under Order xvi., rule 18, for leave to serve third party notices on all the shareholders of the company, 450 in number, on the ground that if they, the Defendants, were held liable, they would have a right over against the shareholders to recover from them the sums received by them by way of dividend:—*Held* (affirming the decision of *Hall*, V.C.), that the granting of the leave asked for would materially embarrass the Plaintiffs in the conduct of their action, and that, therefore, the Court in

PRACTICE—*continued.*
the exercise of its discretion ought to refuse the application. Wye Valley Railway Company *v.* Hawes - - - - - C. A. 489

21. —— *Transfer of pending Action—Winding-up of Company—Jurisdiction—Rules of Court,* 1875, *Order* LI., *rr.* 1, 2*a.*] When an order has been made by a Judge of the Chancery Division for the winding-up of a company under the Companies Acts, 1862 and 1867, the Judge in whose Court such winding-up shall be pending has no jurisdiction, under Order LI., rule 2a, to order the transfer to him of an action pending against the company in another Court of the same Division: such a transfer can only be made by the Lord Chancellor under Order LI., rule 1.—*In re Landore Siemens Steel Company* (10 Ch. D. 489) not followed. *In re* Madras Irrigation and Canal Company - - - - 702

22. —— *Writ—Extension of Time for Indorsement on Writ of Date of Service—Rules of Court,* 1875, *Order* IX., *r.* 13; *Order* LVII., *r.* 6.] Under rule 6 of Order LVII. of Rules of Court, 1875, the Court has power to extend the time fixed by rule 13 of Order IX. for the making an indorsement on a writ of the date of service. Hastings *v.* Hurley - - - - - 734

—— Amendment of pleadings - - - 440
See Easement.

—— Bankruptcy—Appeal - - - - 501
See Bankruptcy. 17.

—— Infants Custody Act—Appeal - 115
See Infant. 2.

—— Lunacy—Deceased lunatic—Inspection of documents - - - - 673
See Lunatic.

—— Partition suit - - - 360, 362
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—— Special case - - - - 66
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—— Winding-up—Interrogatories - 58
See Company. 9.

PREFERENCE SHAREHOLDERS—Dividend out of profits—Reserve fund - - 344
See Company. 4.

PRESCRIPTION — Easement — Life estate—Reversion - - - - 440
See Easement.

PRINCIPAL AND SURETY — *Guarantee—Construction—Determination—Death of Guarantor—Contract for Benefit of Third Party—Right to sue—Measure of Damages—Trustee.*] In May, 1863, a father, on the occasion of the admission of his son as an underwriting member of *Lloyd's*, addressed to the managing committee of that body a letter, by which he held himself responsible for all his son's engagements in that capacity. *Lloyd's* was then a voluntary association, governed by certain by-laws, under which a person once admitted a member could not be excluded from membership except in the event of his bankruptcy or insolvency. The association consisted of underwriting members, non-underwriting members, and subscribers. The practice of the underwriting members was to underwrite policies of marine insurance for the benefit of various owners of property, both members of the association and

PRINCIPAL AND SURETY—*continued.*
outsiders, but the policies with outsiders could only be effected through the agency of insurance brokers who were either members of or subscribers to the association. The association as such incurred no liability on the policies underwritten by its members. In 1871 the society was incorporated by Act of Parliament, all the rights of the committee on behalf of the members being vested by the Act in the corporation. In 1876 the father died, and notice of his death was shortly afterwards given to *Lloyd's*. In 1878 the son became bankrupt, and thereupon ceased to be a member of *Lloyd's*:—*Held*, by the Court of appeal, affirming the decision of *Fry*, J.:—(1.) That the guarantee was not determined by the death of the father or by the notice of it, but that his estate was liable in respect of engagements contracted by the son after his death:—(2.) That the guarantee extended to all engagements contracted by the son as an underwriting member of *Lloyd's*, whether with members or with outsiders:—(3.) That the committee of *Lloyd's*, and the corporation of *Lloyd's* as their successors, were trustees of the benefit of the guarantee for all the persons, whether members or outsiders, with whom the son had contracted engagements as an underwriting member, and that the corporation could maintain an action to enforce the guarantee against the father's estate for the benefit of all those persons; on the ground, as to the outsiders, that the brokers, through whom the son's engagements with them were contracted, were trustees for their principals of the right which they themselves had to call on their own agents, *Lloyd's*, to enforce the guarantee for their benefit.—A guarantee the consideration for which is given once for all, cannot be determined by the guarantor, and does not cease on his death.—Whether a guarantee for future advances, which the party guaranteed is not bound to make, is not determinable by the guarantor, and whether it does not cease on notice of his death, *quære*. Lloyd's *v.* Harper [C. A. 290

PRIORITY—Debentures - - - 66
See Company. 3.

—— Mortgage—Notice—Solicitor - - 178
See Mortgage. 4.

—— Mortgage—Officer's commission - 571
See Mortgage. 5.

PRODUCTION OF DOCUMENTS—Costs of 517
See Practice. 10.

PROFIT AND LOSS—Participation in - 83
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PROFITS—Payment of dividend of company 344
See Company. 4.

PROMOTER—Agreement by - - 125
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PROOF IN BANKRUPTCY - - 330, 620
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PROOF IN WINDING-UP—Secured creditor 590
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PROPERTY OF INFANT—Sale—Discretion of trustees - - - - 161
See Infant. 3.

PROTECTED TRANSACTION—Equitable execution - - - - - 544
See Practice. 18.
PROTECTION OF ESTATE—Costs incurred by tenant for life - - 587, 588, n.
See Settled Estate. 1, 2.
PROTECTOR — Estate tail — Appointment by settlor - - - - 176
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PROVISO FOR REDUCTION OF INTEREST 53
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PURCHASE MONEY—Lands Clauses Act—Application of income - - - 597
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REGISTRAR—Bankruptcy—Discretion - 226
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REGISTRATION—Bill of sale - - 522
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SETTLED ESTATE—*Proceedings for Protection of the Estate—Costs of Tenant for Life permitted to be paid out of Proceeds of Sale of Part of the Estate—Trustee Relief Act* (22 & 23 *Vict. c.* 35), *s.* 30.] Where proceedings have been instituted (though without the preliminary sanction of the Court), whether by claim in an action, or by defence to an action, for the protection of a settled estate, the Court will, if it sees fit, give permission to the trustees to apply the proceeds of the sale of a portion of the estate in defraying the costs already incurred, and which must necessarily be incurred, by the tenant for life, in instituting such proceedings. *Ex parte* Earl De La Warr's Estates - - - - 587

2. —— *Costs of Protecting Estate—Trustees—* 22 & 23 *Vict. c.* 35, *s.* 30.] On a petition presented by trustees of settled estate for the action of the Court, the Court permitted them to apply certain funds not exceeding £3000 in payment of the costs of litigation for the protection of the estate. *In re* Lord River's Estate - - 588, n.
SETTLEMENT—*Marriage Settlement—Covenant to settle future Property, except such as should be otherwise settled—Gift of Legacy to Wife for Separate Use.*] A marriage settlement, in which the wife's property was vested in trustees for her separate use without power of anticipation, contained a covenant by the husband and wife that if at any time during the joint lives of them any further portion, fortune, or estate should come to or devolve upon either of them by or under any will, or otherwise, they would effectually settle the same (except such future portion, fortune, or estate as should be otherwise settled previously to the same devolving as aforesaid) upon the trusts of the settlement:—*Held*, that a gift of a legacy to the wife for her own sole and separate use, free from the debts, control, and engagements of her husband, was excluded from the operation of the covenant. Kane *v.* Kane - - - - - 207
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SHIP—*Artificer's Lien on Ship—Contract to take Bills in Payment—Possession—Negotiation of Acceptance.*] Engineers contracted with the debtor, the owner of a barge, to supply steam machinery to the vessel, at the docks of a dock company, for the price of £1050, to be paid by approved bills; one at three months for £260 when the boiler and engine should be placed in the vessel, one at three months for £260, and one at six months for £530, when the vessel should have made a trial trip. The vessel having been taken to the docks, was there entered in the name of one of the engineers; and whilst shipwrights and other agents of the debtor were occasionally or constantly on board, the vessel remained in the possession of the engineers till the boat was ready to make a trial trip. In the interim the engineers had been paid £360, partly in cash, and partly by the debtor's acceptance, which they discounted. On the day appointed for the trial trip the debtor filed a liquidation petition, and a receiver took possession of the vessel. A few days afterwards the debtor's acceptance was dishonoured:—*Held*, that the lien of the engineers for the unpaid price for the machinery and their labour was not affected by their having agreed to take bills in payment, nor by the nature of the possession, nor by their having discounted the debtor's acceptance. *Ex parte* Willoughby. *In re* Westlake - 604

2. —— *Ship—Wreck—Sale by Master—Necessity.*] On the 19th of April an Austrian ship with a valuable cargo on board ran upon a rock on the eastern side of *Algoa Bay*, distant fifty miles by sea and about eighty by land from *Port Elizabeth*. The Austrian consul at *Port Elizabeth* came to the spot, and, there being no hope of getting the vessel off, he advised the master to sell her with the cargo. The master accordingly advertised the ship and cargo for sale, and they were sold in one lot by auction on the 30th of April for £9500, after a brisk competition. The purchaser got some part of the cargo out of the wreck, but on the 19th of June the ship went to pieces with the rest of the cargo on board. The owners of the cargo having abandoned it to the underwriters as a total loss, the underwriters filed their bill to have the goods which had been brought to land delivered to them as not having been effectually sold. The master had not gone to *Port Elizabeth*, nor endeavoured to procure funds to enable him to save the cargo; nor had he made any effort to induce any persons to undertake the salvage of the cargo. Several witnesses at *Port Elizabeth* deposed that in their opinion no person could have been induced to undertake the salvage; others gave their opinion that offers to

SHIP—*continued.*
save the cargo could have been obtained if a large percentage of the net proceeds had been offered. There was a good deal of evidence to shew that, in the opinion of persons on the spot, the course which had been adopted of selling the wreck and cargo was the most advisable one in the interest of all parties concerned:—*Held*, by the Court of Appeal (affirming the decision of the Master of the Rolls), that no such necessity was proved to have existed as would make the master the agent of the owners of the cargo to effect a sale; that the sale was void; and that the Plaintiffs were entitled to the cargo saved, subject to a proper allowance for salvage and other expenses. Atlantic Mutual Insurance Company *v.* Huth [C. A. 474

SOLICITOR—*Fiduciary Relation—Solicitor and Client—Improper Sale—Measure of Damage—Costs as between Solicitor and Client.*] The Defendant (who was the Plaintiff's solicitor) improperly sold the Plaintiff's property without giving him notice of the sale, and a decree was made against the solicitor directing him to pay damages and costs:—*Held*, that the damages ought to include the difference between the Plaintiff's solicitor and client costs and the party and party costs which he could get under the order for costs. Cockburn *v.* Edwards - - - - 393

2. —— *Lien for Costs—Title Deeds deposited by Mortgagee with Solicitor—Subsequent Employment of Solicitor by Mortgagor.*] A mortgage deed and the title deeds to the mortgaged property were deposited by the mortgagees with their solicitors for safe custody. Afterwards the mortgagor instructed the same solicitors to sell the property, and they employed an auctioneer for the purpose, and made use of the deeds in preparing particulars and conditions of sale. The property was put up for sale, but was not sold. The mortgagor then filed a liquidation petition, and the trustee contracted to sell the mortgaged property:—*Held*, that the solicitors had no lien on the deeds as against the trustee in respect of their costs of the abortive sale. *Ex parte* Fuller. *In re* Long - - - - - 617

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SPECIFIC PERFORMANCE—*Agreement contained in several Documents—Failure to prove one of the Documents—Literary Work—Misstatement as to Authorship—Fraud on Public.*] The Plaintiffs claimed the specific performance of an agreement for the composition of a literary work by the Defendant, alleging that the agreement was contained in three written documents. At the trial the first and third of the documents were proved; the second was not produced, nor was any evidence given of its contents. The Defendant, by his statement of defence, denied that he had agreed with the Plaintiffs, as alleged by them with reference to the second document:—*Held*, that the Plaintiffs were not entitled to specific performance of the agreement contained in the first and third documents, or to damages for the

SPECIFIC PERFORMANCE—*continued.*
breach of it. The Plaintiffs alleged that the Defendant had agreed that his name should not appear on the title-page of the work as the author of it; the Defendant alleged that it was part of the agreement that his name should so appear. The Plaintiffs proposed to publish the book with a title-page, stating that it was "Edited by *K.* (assisted by *M.* (the Defendant)). *K.* was known as having published other books of a similar description, and had allowed the Plaintiffs to make use of his name, but he had taken no part whatever in the compilation:—*Held*, that the proposed title-page would be a fraud on the public, and that on this ground also the Plaintiffs were disentitled to relief. Post *v.* Marsh. 395

STATEMENT OF AFFAIRS — Composition — Omission of creditors - - 131
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TENANT IN TAIL — *Protector of Settlement—Trustees—Death—Tenant for Life*—3 & 4 *Will.* 4, *c.* 74, *s.* 22.] The trustees of the real estate under a will were appointed also protectors of the estates tail created by the will. They all died, and new trustees of the real estate were appointed by the Court:—*Held*, that the tenant for life had become protector of the settlement, and that he and the first tenant in tail could convey. CLARKE *v.* CHAMBERLAIN - - - - 176
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TRUSTEE—*Tenant for Life and Remainderman—Leaseholds—Repairs—Receiver.*] When leasehold houses are vested in trustees on behalf of a tenant for life and remaindermen, it is the duty of the trustees to keep the property free from the risk of forfeiture by a breach of the covenants of the lease, and they are entitled to have the rents applied in keeping the houses in a proper state of repair.—The trustees are not bound to be content with the setting apart of a sum of money in the joint names of themselves and the tenant for life as an indemnity against the consequences of a breach of the covenants of the lease, but are

TRUSTEE—*continued.*
entitled to require the covenants to be specifically performed.—When a tenant for life of leasehold houses is allowed by the trustees to receive the rents, and the houses are not kept in a proper state of repair according to the covenants of the lease, the Court will, at the instance of one of the trustees, appoint a receiver of the rents, for the purpose of enforcing the proper repair of the houses. *In re* Fowler. Fowler *v.* Odell [723

—— Discretion—Sale of estate - - 161
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TRUSTEE IN BANKRUPTCY—New trustee—Refusal to prosecute—Appeal - 110
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—— Removal—Discretion of Judge - 107
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TRUSTEE ACT, 1850 (13 & 14 *Vict. c.* 60), *s.* 5—*Practice — Lunatic Trustee — Vesting Order.*] When one of several trustees of stock becomes lunatic or of unsound mind, the Court, although it may have jurisdiction under sect. 5 of the *Trustee Act*, 1850, to make an order vesting the right to transfer the stock solely in the co-trustees, will not do so, but a new trustee in the place of the lunatic must be appointed before a vesting order will be made. *In re* Nash - - C. A. 503

2. —— (13 & 14 *Vict. c.* 60), *s.* 3—*Lunatic Trustee—Vesting Order.*] A trustee of property held in trust for *A. B.* absolutely having become lunatic, *A. B.* presented a petition asking that the property might be vested in himself:—*Held*, that such an order ought not to be made, but that a new trustee ought to be appointed and the property vested in him. *In re* Holland. *In re* Howarth's Trusts - - - C. A. 672

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—— Penalty - - - - - 675
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WILL—*Construction—Condition in Restraint of Marriage—Restriction qualified to the Case of Marriage with a Domestic Servant—Condition valid.*] Testatrix devised real estate to her father for life, remainder to her brother for life, remainder to his first and other sons in tail, with remainders over. She then bequeathed the proceeds of her residuary personalty in trust for her brother absolutely. But, she declared, if her brother should thereafter, whether he should at the time be in possession as tenant for life or not, marry a domestic servant, or a person who had been a domestic servant, then the devises and bequests in favour of her brother and issue should be null and void, and in lieu thereof she devised her real estate to the use of the Plaintiffs, and declared that the personalty was to be held and enjoyed with a specific part of the realty.—The father survived the testatrix and died. Thereupon the brother became entitled to the realty as tenant for life in possession. Afterwards, the brother married a person who at the time of her marriage was, and had previously been, a domestic servant:—*Held*, that the condition was valid, and that the real estate passed to the Plaintiffs. Jenner *v.* Turner 188

2. —— *Construction—Exoneration of Mortgaged Estates—Mixed Fund—Payment pro ratâ—* 17 & 18 *Vict. c.* 113.] A testator, by will made in 1866, after specifically disposing of certain parts of his property and giving certain real estate to his wife during widowhood, gave the rest and residue of his real and personal estate to trustees upon trust to convert the same into money and thereout pay his debts, including debts due on mortgage of the property given to his wife during widowhood, and his funeral and testamentary expenses, and the costs of proving and executing his will. He directed his trustees to pay the income of the fund to his wife during widowhood, and after her death or second marriage he gave so much of the fund as consisted of pure personalty to charitable purposes, and bequeathed the rest of it to his wife. In a subsequent part of his will he appointed executors, and gave a legacy to each of them who accepted the trusts. At his death part of the residuary real estate was subject to mortgages:—*Held*, by *Fry*, J., that the executor's legacies were charged on the real estate, and that as there was a mixed fund they must be paid *pro ratâ* out of the different parts of it.—

WILL—*continued.*

Held, by the Court of Appeal, that the legacies were charged on the real estate, but only in aid of the personalty, the principle of *pro ratâ* payment only applying to payments which the testator had expressly directed to be made out of the mixed fund.—*Held*, by the Court of Appeal (affirming the decision of *Fry*, J.), that the will did not indicate any such "contrary intention" as to exclude the mortgages on the residuary real estate from the operation of *Locke King's Act*, and that they must be paid out of the proceeds of the mortgaged estate. Elliott *v.* Dearsley **C. A. 322**

3. —— *Construction—Residuary Gift—Codicil —"Everything I am possessed of"—"I give and devise"—"Residuary Legatee"—No Real Estate at Date of Will or Codicil—After-acquired Real Estate—Residuary Devisee—Intestacy as to Real Estate—Vendor and Purchaser Act*, 1874.] A testatrix, by her will, dated in 1854, gave as follows: "I commit to paper my wishes respecting the disposal of my property. . . . Everything I am possessed of I leave to my sister for her life; after her decease I give and devise as here annexed." Then followed a number of legacies, and the will proceeded: "My two nephews, *H. H. M.* and *F. P. M.*, I leave my executors, and the latter residuary legatee after the demise of my sister." —She also executed a codicil, but she had no real estate either at the date of the will or codicil. She afterwards purchased some freehold property, which she held at her death.—*F. P. M.* contracted for the sale of part of the real estate as absolute owner, and an objection having been taken by the purchaser that he had no title:—*Held*, that there was not sufficient context in the will to enable the Court to read the words "residuary legatee" as "residuary devisee," and that, consequently, the real estate did not pass to *F. P. M. Hughes* v. *Pritchard* (6 Ch. D. 24) distinguished. *In re* Methuen and Blore's Contract - **696**

4. —— *Construction—Residuary Gift to Class — Gift at Twenty-one — Interim Discretionary Trust for Maintenance—Interest whether vested or contingent.*] A testatrix gave her residuary real and personal estate to trustees in trust for sale and conversion and investment of the proceeds, and to hold the investments upon trust to pay the income thereof, "or such part thereof as her said trustees" should "from time to time deem expedient," in or towards the maintenance and education of her children until they should attain their respective ages of twenty-one years; and from and immediately after their attaining their respective ages of twenty-one years, then upon trust to pay and transfer the capital to her said children in equal shares, and to settle each daughter's "share whether original or accruing"; and the testatrix empowered her trustees to dispose of any competent part, not exceeding one half, of "the presumptive share of any of her children," for their advancement in life.—The testatrix left three children, of whom two attained twenty-one, and the third died an infant:—*Held*, that the infant did not take a vested interest in his one-third share of the residuary estate of the testatrix.—*Fox* v. *Fox* (Law Rep. 19 Eq. 286) distinguished. *In re* Parker. Barker *v.* Barker **44**

WILL—*continued.*

5. —— *Construction—Residuary Gift to Individual—Gift at Thirty—Interim Trust for Maintenance — Interest whether vested or contingent.*] A testator bequeathed his residuary personal estate to trustees in trust for conversion and investment, and to pay the income to *B.* for his maintenance and until he should attain the age of thirty; and upon his attaining that age to pay or transfer the capital to him absolutely. *B.* survived the testator and died under thirty:—*Held*, that *B.* took a vested interest. *In re* Bunn. Isaacson *v.* Webster - - - - **47**

6. —— *Construction—"Unmarried."*] Property was given by will to trustees in trust for *A.* for life, "but if he should die unmarried," to be equally divided between the children of *B.* At the date of the will *A.* was a bachelor, and at the time of his death he was a widower:—*Held*, that in the absence of context shewing a contrary intention, the word "unmarried" must be construed according to its ordinary or primary meaning, as "never having been married," and therefore that the gift to the children of *B.* did not take effect. Dalrymple *v.* Hall - - - - **715**

7. —— *Construction—Vested Interest—Erroneous Reference.*] A testator gave the interest arising from a sum of stock to *V. D.*, which interest he was to enjoy along with his wife, *M. D.*, during their respective lives, but in the event of either dying and the survivor marrying again, then the capital to be divided, share and share alike, between their children; an arrangement ultimately to take place at the death of their parents, should neither marry again. The testator then directed that the money should not be removed from the English funds during the lifetime of *V. D.* and *M. D.*, not until the period arrived "for its distribution (after their death) among their children surviving, share and share alike":—*Held* (affirming the decision of *Jessel*, M.R.), that the interests of the children were not contingent on their surviving their parents, the concluding words not being sufficient to render the previously vested gift contingent. *In re* Duke. Hannah *v.* Duke - - **C. A. 112**

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